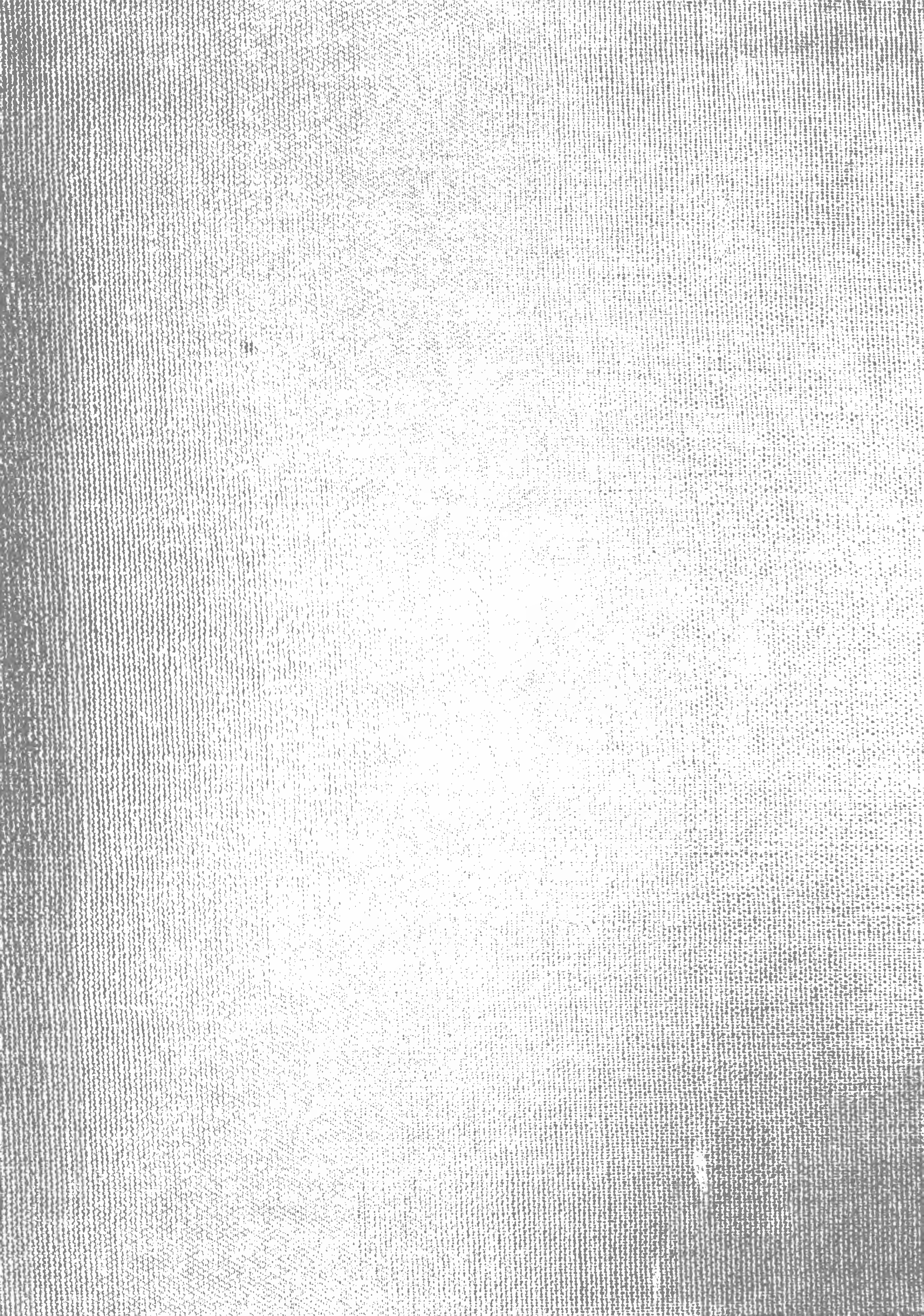


Cattered

JUL 20 1939

F 2302

San Francisco
Law Library

436 CITY HALL

No. 192739

EXTRACT FROM RULES

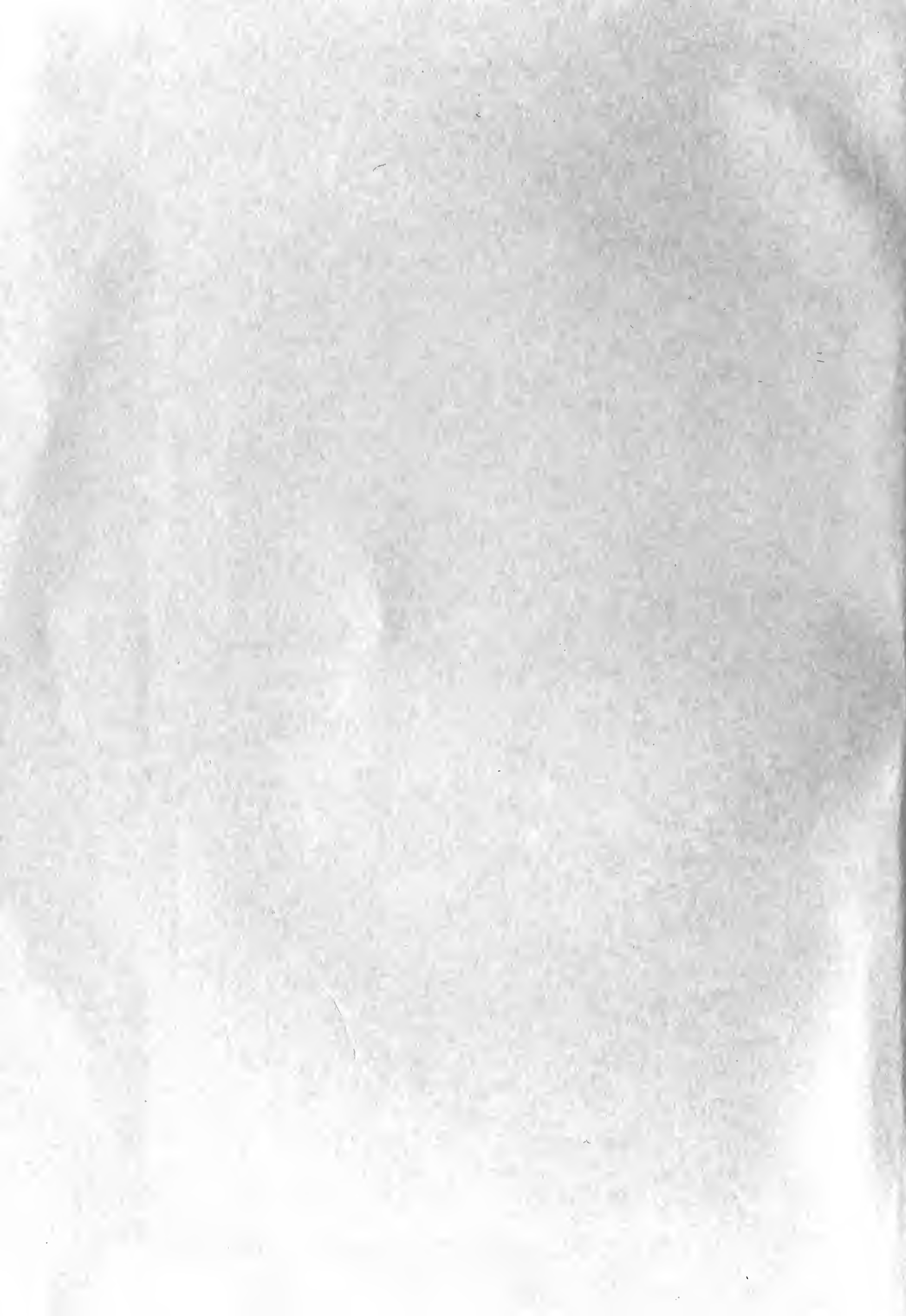
Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

http://www.archive.org/details/govuscourtsca9briefs3475



No. 22366

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Metropolitan Savings and Loan Association, a corporation, and Fidelity Service Corporation, a corporation,

Appellants,

vs.

Williams Construction Co., a corporation, and A. J. Bumb, Receiver,

Appellees.

APPELLANTS' OPENING BRIEF.

McKenna & Fitting,
Daniel N. Belin,
Aaron M. Peck,

427 West Fifth Street,
Los Angeles, Calif. 90013,

Attorneys for Appellants Metropolitan Savings and Loan Association and Fidelity Service Corporation.

FILED

MAR 12 1968

WM. B. LUCK, CLERK

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

MAR 13 1968

TOPICAL INDEX

Page

I.

Statement of Jurisdiction 1

II.

Statement of the Case 2

III.

Specification of Errors 8

IV.

Summary of Issues and Argument 9

A. Can the Lots Subject to Metropolitan's Deed of Trust Be Sold Separately, Free and Clear of Metropolitan's Lien 10

B. Is There an Equity in the Land Which Can Be Realized by the Receiver 11

C. Will the Order Restraining Foreclosure of Metropolitan's Deed of Trust and the Order That the Lots Be Sold Separately, Free and Clear of Metropolitan's Lien, Cause Metropolitan Substantial Injury 12

V.

Argument 13

1. Metropolitan's Deed of Trust Upon the Land Is a Blanket Lien Under the Terms of Which Williams Is Not Entitled to Any Reconveyance Until the Obligation Which It Secures Has Been Paid in Full. The Rights of the Receiver to Such Reconveyance Are No Greater Than the Rights of Williams 13

Page

2. The Order Restraining Metropolitan From Foreclosing Its Deed of Trust Should Be Vacated Because There Is No Realizable Equity in the Property Subject Thereto to Be Preserved 25

3. The Orders in Question Should Be Vacated Because Their Implementation Will Result in Substantial Injury to Metropolitan 27

   A. The Order Restraining Foreclosure 28

   B. The Order Authorizing the Sale of the Lots Individually Free of Metropolitan's Lien 31

VI.

Conclusion 33

TABLE OF AUTHORITIES CITED

Cases Page

Allebach v. Thomas, 16 F. 2d 855 21
American Motors Products Corporation, In re, 98 F. 2d 774 .... 13, 17, 18
Arnold v. Phillips, 117 F. 2d 497 13
Beardsley, In re, 38 F. Supp. 799 32
Bradbury v. Thomas, 135 Cal. App. 435 ......13, 14, 15
Bushong v. Theard, 37 F. 2d 690 26
Christensen v. Felton, 322 F. 2d 323 16
Conley v. Porvay Land and Inv. Co., 232 Cal. App. 2d 22 14
Continental Bank and T. Co. v. Chicago etc. Co., 294 U.S. 648 21
Davies v. Union Trust Co., 125 Cal. App. 593 .. 14
Durst, In re, 44 F. Supp. 486 17
Frederick v. Fidelity Mut. Life Ins. Co., 256 U.S. 395 16
German, In re, 193 F. Supp. 948 16
Grant, In re, 21 F. 2d 88 17
Hoehn v. McIntosh, 110 F. 2d 199 ....17, 28
Holiday Lodge, Inc., In re, 300 F. 2d 516 28
Jersey Island Packing Co., In re, 138 Fed. 625 ..21, 25
Kagan v. Industrial Washing Machine Corp., 182 F. 2d 139 17
Kimmel v. Crocker, 72 F. 2d 599 26
Lustron Corp., In re, 184 F. 2d 789 24
Martin v. New York Life Ins. Co., 104 F. 2d 573 .. 16

Page

North Atlantic & Gulf S.S. Co., In re, 204 F. Supp. 899 18

Ontario Land and Improvement Co. v. Bedford, 90 Cal. 181 14

Spitzel & Co., In re, 168 Fed. 156 17

Stone v. Mondie, 157 F. Supp. 929 16

Tracy, In re, 194 F. Supp. 293 ....26, 28

Woodmar Realty Co. v. McLean, 294 F. 2d 785 cert. den. 369 U.S. 802 16

York Mfg. Co. v. Cassell, 201 U.S. 344 16

Zartman v. First Nat. Bank, 216 U.S. 134 16

Rules

Rules and Regulations for Federal Saving and Loan Insurance Corporation, Sec. 561.15 29

Rules and Regulations for Federal Saving and Loan Insurance Corporation, Sec. 561.16 29

Statutes

Civil Code, Sec. 2924(a) 3

Civil Code, Sec. 2924(c) 15

United States Code Annotated, Title 11, Sec. 47 1

United States Code Annotated, Title 11, Sec. 67-(c) 1

United States Code Annotated, Title 11, Sec. 714 .. 26

United States Code Annotated, Title 28, Sec. 1334 1

Textbook

Corpus Juris Secundum, Sec. 479 13

No. 22366

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Metropolitan Savings and Loan Association, a corporation, and Fidelity Service Corporation, a corporation,

Appellants,

vs.

Williams Construction Co., a corporation, and A. J. Bumb, Receiver,

Appellees.

APPELLANTS' OPENING BRIEF.

I.

STATEMENT OF JURISDICTION.

This is an appeal from a decision of the United States District Court for the Central District of California (hereinafter called "the Court below") on the review, pursuant to 11 U.S.C.A. §67(c), of orders of a referee in bankruptcy. The Court below had jurisdiction pursuant to 28 U.S.C.A. §1334 which provides that

> "District Courts shall have original jurisdiction . . . of all matters and proceedings in bankruptcy."

Jurisdiction over the instant appeal is conferred upon this Court by 11 U.S.C.A. §47 which provides that courts of appeal

> "are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact . . . ."

The Appellants herein seek to have this Court reverse the decision of the Court below affirming certain orders of the referee in bankruptcy [C. T. p. 162].

II.

STATEMENT OF THE CASE.

Appellants herein, Metropolitan Savings and Loan Association (hereinafter referred to as "Metropolitan") and Fidelity Service Corporation are the Beneficiary and Trustee respectively of a deed of trust on an R-1 Zoned 40-acre tract of land near Walnut in Los Angeles County (hereinafter sometimes referred to as "the land") of which Respondent Williams Construction Company (hereinafter referred to as "Williams") is the Trustor and owner. The deed of trust secures payment of a promissory note in the principal amount of $1,075,200.00 which matured on November 1, 1965 [R. T. p. 4, line 25, to p. 5, line 9; Exs. A and 5]. The land was acquired by Williams, a speculative builder, in 1963 for the purpose of constructing a housing tract [R. T. p. 123, line 2, to p. 126, line 18], was originally subdivided into 129 lots twenty of which have been sold, and now consists of 109 lots [R. T. p. 125, lines 7-11].

On September 1, 1965, the note secured by the deed of trust became delinquent for failure of Williams to

make the required payment and on September 30, 1965, Metropolitan caused to be recorded a "Notice of Default and Election to Sell Under Deed of Trust" [C. T. p. 68, line 30, to p. 69, line 25; Ex. G; see Section 2924a, California Civil Code].

On January 27, 1966 (approximately four months after the notice of default was recorded), when a trustee's foreclosure sale was imminent, Williams filed a Debtor's Petition in Chapter XI and an "Application to Stay Deed of Trust Foreclosure Proceedings and Trustee's Sale"; and, on the same day, an "Order to Show Cause Upon Application to Stay Court Action and Foreclosure, and Temporary Restraining Order" was issued [C. T. pp. 5-6]. Thereafter, a receiver in bankruptcy took possession of the land and joined in the application to restrain Metropolitan's foreclosure [C. T. pp. 13-14].

The order to show cause came on for hearing on September 1, 1966, before a referee in bankruptcy; the hearing was continued from time to time until September 30, 1966 [R. T. p. 1, lines 19-20; p. 206, line 1; p. 274, line 1; p. 445, line 1].

The alleged basis of the debtor's and receiver's application to restrain foreclosure was that there was a realizable equity in the land which should be preserved for the benefit of unsecured creditors. At the hearing, the receiver called three witnesses to testify regarding the value of the land. The first witness, Sam Jonas, stated that after examining the land for approximately half a day and checking into comparable sales for half a day, he had formed the opinion that the average value of the lots was $12,500 each [R. T. p. 15, lines 13-24; p. 24, lines 12-23]. A second witness, Eleanor Sam-

uels—the broker who had originally sold the tract to Williams—testified, over the objection of Metropolitan, that she thought the lots could be sold for about $12,000 to $18,000 each [R. T. p. 105, lines 3-7]. She pointed out, however, that expenses for promoting the sales at this price would have to be incurred [R. T. p. 116, line 11, to p. 117, line 2]. Williams, the owner of the lots, then testified that he thought the lots were worth from $14,000 to $16,000 "depending upon when they are sold, the terms upon which they may be sold and to whom they are sold" [R. T. p. 150, lines 3-24]. All of the witnesses apparently based their opinions upon the assumption that the sales would take place over a period of time and that the lots would be sold on an individual basis; none of the estimates would apply if the lots were sold as a tract [see *e.g.* R. T. p. 32, line 25, to p. 33, line 4; p. 35, line 16, to p. 36, line 1].

In resisting the application, Metropolitan established that its deed of trust was a "blanket" deed of trust on the entire tract; that the only provision therein for releases of individual lots from the lien thereof (which sometimes is called the right to partial reconveyances) expressly conditioned such right to partial reconveyances upon (1) the obligation being current, and (2) the obligation not having matured [Ex. 5]; that there had been a default under the deed of trust since September 1, 1965—approximately one year [Ex. G]; that the obligation matured on November 1, 1965 [Ex. A]; that the total indebtedness as of September 30, 1966 was $999,317.00, and that amount increased by $188.94 per day [R. T. p. 222, line 16, to p. 224, line 20]. Metropolitan then introduced expert testimony that the fair market value of the 109 lots, if sold as a tract,

would be $924,630.00 [R. T. p. 310, lines 6-10], and offered to prove the following:

> "Mr. Belin: Mr. Diedrich would testify, as he already has, that he is in the business of buying and developing and selling property; that about a year ago he talked with Mr. Kollie and was told that Metropolitan might foreclose and might have the property available and would give it to him on a 100 per cent financing basis for about $8,500.00 a lot; that he went to the property, looked at it and determined that, as a business man in this business, he didn't think the property was worth this for his purposes, namely, buying all 109 lots at that particular wholesale value, and he would explain the reasons as to why he doesn't think it is worth that." [R. T. p. 373, lines 6-20].
>
> * * *
>
> "Mr. Belin: I will offer to prove that the opinion [of the expert witness] would be that the fair market value [of the lots if sold as a tract] is not in excess of $8,000.00 or $8,500.00." [R. T. p. 408, lines 19-22].

Both offers of proof were rejected by the referee [R. T. p. 373, lines 21-22; p. 408, lines 23-24].

Thereafter, the referee entered "Findings of Fact and Conclusions of Law" that included, *inter alia,* the following:

> "That the fair market value of the property on September 30, 1966, is $1,362,500.00;[1]
>
> "That there is a substantial equity of the debtor in the said property.
>
> * * *

---

[1]The finding of value was based upon a sale of the land on a lot-by-lot basis [C. T. p. 70, lines 2-9].

> "That a restraining order should issue restraining the Fidelity Service Corporation as Trustee, and Metropolitan Savings and Loan Association as Beneficiary, under that certain deed of trust executed on March 25, 1965, recorded on March 31, 1965 from proceeding with its foreclosure until further order of Court." [C. T. p. 4, lines 6-16].

On November 23, 1966, an "Order Restraining Foreclosure Proceedings" was filed, and on December 2, 1966, Metropolitan filed a "Petition for Review" of said order [C. T. pp. 47-48; pp. 49-52].

During the course of the proceedings referred to above, the receiver filed another application—this one seeking an order authorizing him to sell the land free and clear of the lien of Metropolitan [C. T. pp. 19-20]. An "Order to Show Cause" was issued [C. T. p. 22] and Metropolitan filed an "Answer to Application to Transfer Lien of Respondent to Proceeds" in which it referred to the deed of trust and the fact that the obligation secured thereby was both delinquent and past the date of maturity, and alleged and contended that by reason of these facts:

> ". . . no sale of [the land] or any portion thereof can be made free and clear of the lien . . . created by the aforesaid deed of trust . . . unless the net proceeds of such sale are sufficient to discharge, satisfy, and pay in full the entire indebtedness owing and to be owing to Respondent under the aforesaid deed of trust . . . which said sum as of September 30, 1966 was the sum of $996,317.00 plus interest thereon at the rate of $188.94 per day." [C. T. p. 31, lines 17-25].

The order to show cause came on for hearing on November 28, 1966. On January 17, 1967, the bankruptcy court entered "Findings of Fact and Conclusions of Law", which contained, *inter alia,* the following:

> "That an order should be entered herein authorizing the receiver to sell said lots separately, free and clear of all encumbrances, and that such liens be transferred to the proceeds of such sales" [C. T. p. 7, lines 7-10];

and entered an "Order Re Application to Transfer Lien to Proceeds" [C. T. pp. 72-73].[2] On January 24, 1967, Metropolitan filed its "Petition for Review" of said order [C. T. pp. 80-83].

On January 31, 1967, pursuant to stipulation of the parties, the Court herein entered an order which consolidated the petitions for review of the two orders for review and hearing by this Court.

The petitions for review came on for hearing before the Court below in June of 1967. On September 18 the Court handed down a "Memorandum Opinion" expressing the view that the action of the referee in bankruptcy in ordering the sale of the land on a lot-by-lot basis free and clear of Metropolitan's lien was correct [C. T. pp. 157-160], but containing no direct reference to the order restraining Metropolitan from foreclosing its deed of trust. A few days later, however, on September 22, 1967, it corrected the omission by entering an order confirming the "Order Restrain-

---

[2]The order itself does not specify that the sales shall be free and clear of Metropolitan's lien. However, it is obvious from the Application and the Findings that this is its intent.

ing Foreclosure Proceedings" dated November 23, 1966, and the "Order Re Application to Transfer Lien to Proceeds" dated January 17, 1967 [C. T. pp. 184-185].

On September 27, 1967, Appellants filed a timely "Notice of Appeal" from the September 22, 1967, order.[3]

III.
SPECIFICATION OF ERRORS.

The fundamental error of both the referee in bankruptcy and the Court below stems from their apparent failure to comprehend both the nature of and limitations upon the power of a bankruptcy court as regards secured creditors, and the seriously prejudicial effects upon Metropolitan of the orders in question. What these orders do, in effect, is sacrifice the immediate legal remedies and interests of a secured creditor in exchange for a problematical expectation of effecting future improvement in the position of the unsecured creditors and, ultimately, of Williams.

More specifically, the District Court erred in:

(1) Finding that the bankruptcy court had the power to order that lots subject to Metropolitan's deed of trust be sold separately, free and clear of Metropolitan's lien, thus depriving Metropolitan of some of its security and transforming the character of the remainder from a tract of substantially contiguous lots sub-

---

[3]Appellants had earlier, on September 21, 1967, filed a "Notice of Appeal" from the "Memorandum Opinion"; but when it became evident that the September 22 Order was intended to constitute the final ruling on the Petitions for Review, the Appellants filed the September 27 notice.

ject to a planned development on an integral basis to an aggregation of lots not subject to such development, and impairing Metropolitan's substantive right to the repayment of principal at the maturity of the loan;

(2) Finding that the debtor had an equity in the land;

(3) Finding that the action of the bankruptcy court in entering the orders in question would not cause substantial injury to Metropolitan.

IV.
SUMMARY OF ISSUES AND ARGUMENT.

Technically, there are two separate ultimate issues before this Court:

(1) Whether the order of the referee in bankruptcy restraining Metropolitan from foreclosing its deed of trust should be reversed;

(2) Whether the order of the referee in bankruptcy authorizing the receiver to sell the lots separately, free and clear of Metropolitan's lien, should be reversed.

Practically, however, these issues are interdependent. Unless the lots can be sold on an individual basis, as provided in the order permitting a sale free and clear of Metropolitan's deed of trust, there is no equity in the property, and thus no justification for restraining Metropolitan from foreclosing its deed of trust. On the other hand, once the restraining order was vacated, Metropolitan would presumably foreclose and the sale order would be a nullity.

In Metropolitan's view, the issues before the Court, and Metropolitan's position thereon, are as follows:

A. Can the Lots Subject to Metropolitan's Deed of Trust Be Sold Separately, Free and Clear of Metropolitan's Lien?

The 109 lots which are involved in these proceedings are subject to a single or blanket deed of trust in favor of Metropolitan. A trustor has no right to secure the release of any portion of the security subject to a blanket deed of trust, except as provided therein, until the discharge of the indebtedness which it secures. In the instant case the only provision in the deed of trust pertaining to partial releases of security expressly conditions the trustor's right to such releases upon the note not being in default and not being mature. Yet the note had been both in default and mature for over a year when the Court ordered the lots to be sold separately, free and clear of Metropolitan's lien.

It is well established that a receiver in bankruptcy has no greater rights with respect to secured creditors than was enjoyed by the owner. Since the trustor, Williams, could not obtain the release of separate lots from the lien until the indebtedness which it secures had been discharged, neither can the receiver.

The reliance of the Court below on the rule that a bankruptcy court may prescribe the procedure by which a secured creditor realizes upon his security, provided that such procedure is as adequate and efficient as that of which the secured creditor would otherwise avail itself, is misplaced.

First, the procedure provided by the bankruptcy court does not even approach the required standard of ade-

quacy and efficiency. Under the terms of its deed of trust Metropolitan can effect an immediate liquidation of its claim through foreclosure under power of sale. Under the bankruptcy court procedure the foreclosure process would be drawn out over a number of years. Compelling it to retain a delinquent loan of approximately $1,000,000 for this period of time would have seriously prejudicial consequences to Metropolitan.

Second, nothing in a bankruptcy court's power to prescribe the foreclosure procedure permits a bankruptcy court to deprive a secured creditor of the specific security for which it contracted. Yet in the instant case the effect of the order that the subject lots are to be sold on an individual basis free and clear of Metropolitan's lien would be to deprive Metropolitan of, and to transform the fundamental character of the remainder of, that security.

Finally, Metropolitan does not merely have the right to the repayment of a sum of money at some indefinite point in the future; rather, it made Williams a loan for a limited period of time—and *only* for a limited period of time. When the loan matured it was entitled to the repayment of principal and accrued interest. What the referee in bankruptcy has done is to rewrite the loan contract between Metropolitan and Williams to transform it from an eight-month loan payable on maturity to a loan for the duration of the contemplated sales program repayable as lots are sold.

B. Is There an Equity in the Land Which Can Be Realized by the Receiver?

In a situation such as that involved here a secured creditor may be restrained from foreclosing its deed of

trust only if there is an equity in the land realizable by the receiver, and the burden of establishing the existence of such an equity is upon the applicants for the restraining order.

Metropolitan submits that it is apparent from the evidence upon which the restraining order was based that there is no realizable equity in the land. The undisputed evidence demonstrates that the amount realizable from a sale of the lots as a tract is less than the amount owing to Metropolitan. A sale of the lots separately, subject to Metropolitan's deed of trust, is obviously unfeasible because each lot would be subject to an encumbrance of many times its value. The only other alternative, a sale of the lots separately, free of Metropolitan's lien, is precluded since, as a matter of substantive law, no portion of Metropolitan's security may be released from its lien in the absence of a payoff.

C. Will the Order Restraining Foreclosure of Metropolitan's Deed of Trust and the Order That the Lots Be Sold Separately, Free and Clear of Metropolitan's Lien, Cause Metropolitan Substantial Injury?

Regardless of the question of whether the bankruptcy court may order a partial reconveyance of security when not authorized by the deed of trust or the existence of a realizable equity in the security, the bankruptcy court may not make orders such as those in question when their implementation will result in substantial injury to a secured creditor. Here such substantial injury is clearly present.

V.

ARGUMENT.

1. Metropolitan's Deed of Trust Upon the Land Is a Blanket Lien Under the Terms of Which Williams Is Not Entitled to Any Reconveyance Until the Obligation Which It Secures Has Been Paid in Full. The Rights of the Receiver to Such Reconveyance Are No Greater Than the Rights of Williams.

Under California law, a trustor has no right whatever to a partial reconveyance of the property subject to a deed of trust in the absence of a provision in the deed of trust which allows such reconveyance:

> "Certainly, if the mortgage had contained no release provision there could have been no pretense on their [the mortgagors'] part that they were entitled to have any of the mortgaged premises freed from the mortgage lien." [*Bradbury v. Thomas,* 135 Cal. App. 435, 442 (1933)].[4]

When a deed of trust does provide for partial reconveyances, the trustor is entitled to such reconveyances only when he complies with the conditions therefor prescribed in the deed of trust.

> *Bradbury v. Thomas,* 135 Cal. App. 435, 441-443 (1934);

---

[4]It is well settled that for purposes of the Bankruptcy Act, the rights and obligations of the parties to a deed of trust are determinable by reference to local law. *In re American Motors Products Corporation,* 98 F. 2d 774, 775 (2d Cir. 1938); *Arnold v. Phillips,* 117 F. 2d 497, 500 (5th Cir. 1951). The local law governing this issue is obviously, in view of the many and obvious contacts between this controversy and California, the law of California. In any event, however, the California law on this question appears to be the same as that which prevails throughout the United States. See Corpus Juris Secundum, Mortgages, §479.

Davies v. Union Trust Co., 125 Cal. App. 593, 601 (1932);

Ontario Land and Improvement Co. v. Bedford, 90 Cal. 181, 184 (1891);

Conley v. Porvay Land and Inv. Co., 232 Cal. App. 2d 22, 25 (1965).

The *Bradbury* case, for example, involved a mortgage upon lots which, like the deed of trust herein, specifically provided that the mortgagors were entitled to the release of a portion of the security upon the payment of a specified amount in reduction of the loan, *provided that the mortgagors were not then in default under the mortgage.* The mortgagors paid the specified amount at a time when, although no default had been recorded, the mortgagors were delinquent in their payments. The court held that the mortgagors, despite their payment, had not satisfied the default condition and therefore were not entitled to the release of any lots from the mortgage:

> "The ordinary meaning of the word 'default', when used with respect to an obligation created by contract, is failure of performance. When used with reference to an indebtedness it means simply non-payment.
>
> * * *
>
> "Appellants occupy the position of mortgagors who are seeking to quiet their title against a mortgagee without paying or offering to pay the debt for which the mortgage was given. This they may not do. The only method for them to quiet the mortgage is to pay the debt which it secures [citing cases]." (135 Cal. App. 443, 445).

The facts of the instant case are immensely stronger than those in *Bradbury*. Rather than a mere technical noncompliance with a required condition, there was a total absence of the safeguards which Metropolitan and Williams had agreed would have to exist before any portion of the land could be released from Metropolitan's lien. The only provision in the deed of trust dealing with partial releases expressly conditions the trustor's rights to such releases upon the note not being delinquent or mature [Ex. 5]. Yet, at the time of the entry of the order in question, the note was both delinquent and mature and, in fact, a notice of default had been recorded for more than a year [Ex. G]. Furthermore, because the ninety day loan reinstatement period prescribed by statute had run [Civil Code Section 2924(c)], the indebtedness evidenced by the note secured by Metropolitan's deed of trust was irrevocably accelerated. It is abundantly clear that, under the circumstances of this case, Williams could not be entitled to force Metropolitan to release any portion of the security which forms the subject matter of its deed of trust.

Does the receiver herein enjoy any greater rights, vis-a-vis Metropolitan, than the trustor? The answer is no. In the absence of a specific statutory provision to the contrary, a trustee in bankruptcy acquires no greater interest in property than belonged to the bankrupt:

> "Under the provisions of the bankrupt act (sic), the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trus-

tee's title accrued" [*York Mfg. Co. v. Cassell,* 201 U.S. 344, 352 (1905)];
". . . the trustee takes the property of the bankrupt . . . as the debtor had it at the time of the petition, subject to all valid claims, liens and equities" [*Zartman v. First Nat. Bank,* 216 U.S. 134, 138 (1910)];
"A trustee in bankruptcy cannot acquire a greater right or interest in the bankrupt's property than that which belonged to the bankrupt" [*Martin v. New York Life Ins. Co.,* 104 F. 2d 573, 574 (1939)].

Cases stating this proposition are legion. See, *e.g.,*

Stone v. Mondie, 157 F. Supp. 929, 930 (D.C. Okla. 1957);

Christensen v. Felton, 322 F. 2d 323, 327 (9th Cir. 1963);

Woodmar Realty Co. v. McLean, 294 F. 2d 785, 793 (7th Cir. 1961), *cert. den.* 369 U.S. 802;

In re German, 193 F. Supp. 948, 953 (D.C. Ill. 1961).

It has been applied with respect to many types of assets:

Insurance:

Frederick v. Fidelity Mut. Life Ins. Co., 256 U.S. 395 (1921) (Failure of trustee to comply with provision in policy requiring that the insured give insurance company timely notice of intent to change beneficiary and secure consent of officer of company thereto held to preclude recovery by trustee of cash surrender value of policy).

In re Grant, 21 F. 2d 88 (D.C. Cir. 1927) (Trustee entitled to recover cash surrender value of policy in which right to change beneficiary was reserved to bankrupt, but had no claim to cash surrender value of policy in which right to change beneficiary not so reserved).

Property sold under Conditional Sales Contract: Kagan v. Industrial Washing Machine Corp., 182 F. 2d 139 (1st Cir. 1950) (Trustee in bankruptcy had no greater rights against conditional vendor to title to washing machine sold under conditional sales contract than did conditional vendee).

Contracts Limiting Use:

In re Spitzel & Co., 168 Fed. 156 (D.C. N.Y. 1909) (Trustee in bankruptcy bound by provisions of contract with manufacturer requiring resale of goods at a fixed price).

Most important of all for purposes of the instant case, the trustee in bankruptcy has no greater right against the mortgagee with respect to mortgaged property than was enjoyed by the mortgagor.[5]

In re American Motor Products Corporation, 98 F. 2d 774, 775 (3rd Cir. 1938);

In re Durst, 44 F. Supp. 486, 488 (D.C. Iowa 1942);

Hoehn v. McIntosh, 110 F. 2d 199, 201-202 (6 Cir. 1940);

---

[5]Moreover, in this case, it is not even a trustee who has succeeded to the title of the bankrupt that is involved. Rather, it is a receiver who has only possession of the property in question and no title whatever.

In re North Atlantic & Gulf S.S. Co., 204 F. Supp. 899, 903 (D.C. N.Y. 1962).

In the *American Motor* case, the mortgage provided that if the mortgagee

> "retains counsel for the purpose of collecting any monies which may be due under the mortgage . . . [mortgagor] agrees to pay counsel fee, the amount of which is hereby expressly fixed at a sum which shall be equal to 15% of the balance due and unpaid under this mortgage. . . ." (98 F. 2d 775).

Upon the bankruptcy of the mortgagor and the taking of possession of the mortgaged property by the trustee, the mortgagee's counsel attempted to collect the amount due. The trustee in bankruptcy contended that it was not bound by the attorneys' fee provision in the mortgage, and that the mortgage lien "must be limited to what might be found fair and reasonable compensation for services necessarily performed." (98 F. 2d 774). The Court of Appeals, through a panel including both Judges Learned Hand and Augustus Hand, repudiated this contention. It pointed out that attorney's fee provisions were valid under local law, that the trustee took the mortgaged property subject to the lien, and that

> "in the absence of fraud or usury, a court may [not] substitute its own ideas of what would be just and fair to nullify the agreement of the parties to a contract." (98 F. 2d 775).

The instant case is one in which a referee in bankruptcy has substituted his own ideas of what would be "just and fair" and, in so doing, has sought to nullify the contract between the parties. The order of the ref-

eree authorizing the separate release of lots from Metropolitan's deed of trust is in clear and flagrant violation of the terms of that deed of trust. Metropolitan could have made 109 separate loans to Williams, each secured by a separate deed of trust upon one of the lots which is a part of said real property. But that was not done. Instead, the parties entered into a contract under which the *total* security was to secure payment of the *total* indebtedness; portions of the security could be released upon payment of a specified sum upon the indebtedness only prior to maturity of the loan and only when the loan was not in default.

The conditions for a partial release were not satisfied. Williams could not compel Metropolitan to release portions of its security, and neither can the receiver.

Why then, did the Court below find that the bankruptcy court was vested with the power to order the sale of individual lots free and clear of Metropolitan's lien? The answer is to be found in the following statement:

> "This Court is of the opinion that the powers of sale of the Referee are derived from the Bankruptcy Act, not by subrogation to the rights of the debtor under the deed of trust. While it is true that the rights of the trustee, or receiver, in the property are no greater than those of the debtor, it is well established that there may be a substitution of the remedy provided by the contract *without impairment to substantive rights so long as it is efficient and adequate* [citations]. In the instant case a judicial sale by the Bankruptcy Court has been substituted for the remedy of foreclosure by trustee's sale provided in the deed of trust.

> 'Everyone who takes a mortgage, or deed of trust, intended as a mortgage, takes it subject to the contingency that proceedings in bankruptcy against the mortgagor may deprive him of the specific remedy which is provided for in the contract." [citation] The determination of the manner of the sale, in lots or in bulk, is in the sound discretion of the Referee, and should be made so as to obtain for the property the highest possible price [citations]." [C. T. p. 158, line 29, to p. 159, line 21; emphasis added].

In other words, the Court below reasoned that the bankruptcy court has the power to prescribe the procedure by which a secured creditor realizes upon its security, and all that the orders here in question involve is the application of that power.

While such an analysis has an undeniable specious appeal, Appellants submit that it is nonetheless fundamentally erroneous.

First, the immediate remedy provided here is manifestly not adequate or efficient from Metropolitan's viewpoint. One of the critical considerations for virtually all secured creditors—and particularly a regulated lender such as a savings and loan association whose delinquent loans have a profoundly adverse effect upon its general business operation—is the time required for foreclosure. An immediate judicial sale is at least arguably an adequate remedy since it would permit prompt realization upon the security. But here the bankruptcy court contemplated a sales program extending over a number of years. To say that such a remedy is as adequate and efficient as that of which Metropolitan would otherwise avail itself is ludicrous.

Secondly, as the court below itself acknowledged—apparently without taking cognizance of the implications of its words—the powers of the bankruptcy court do not extend to affecting the *substantive* rights of the secured creditor, but only the *remedy* by which the secured creditor realizes upon his security. As stated by this very court in *In re Jersey Island Packing Co.*, 138 Fed. 625 (9th Cir. 1905):

> "Everyone who takes a mortgage, or deed of trust intended as a mortgage, takes it subject to the contingency that proceedings in bankruptcy against his mortgagor may deprive him of the *specific remedy which is provided for in his contract*" (138 Fed. 627; emphasis added).

The limited character of the bankruptcy court's powers was delimited in the subsequent decision of *Allebach v. Thomas,* 16 F. 2d 855 (4th Cir. 1927):

> ". . . the bankruptcy proceedings shall not effect the validity of the lien; but it nowhere says that this fact shall in any manner effect the *remedy to enforce the lienor's rights. The remedy may be altered without impairing the obligations of the contract,* so long as an equally adequate remedy is afforded" (16 F. 2d 855; emphasis added).

Similarly, in *Continental Bank and T. Co. v. Chicago etc. Co.,* 294 U.S. 648 (1934) the Supreme Court held that the action of a bankruptcy court in enjoining the sale of collateral pledged as security for loans was justified because:

> "It [the injunction] in no way impairs the lien or disturbs the preferred rank of the pledgees. It does no more than suspend the enforcement of the

> lien by a sale of the collateral pending further action . . .
> * * *
> "*It effects only the remedy*" (294 U.S. 676, 681; emphasis added).

Whatever the validity of the Court's analysis if the sale of the lots was to be effected on a simultaneous basis, in the instant case the lots were to be sold at different times over a number of years. Metropolitan is entitled, under California law, to have *the total security in its existing form* securing Williams' indebtedness to it so long as any portion of the indebtedness remains unpaid. Hence, the effect of the order that the lots could be sold separately, free and clear of Metropolitan's lien was not merely to substitute one remedy for another or to determine the details of the remedy prescribed by the bankruptcy court. Rather it was to deprive Metropolitan of (1) its right to the *total* security, and (2) of the particular security for which it had contracted.

At present the security consists of a tract of substantially contiguous lots capable of development on an integral basis and hence saleable to one interested in and able to engage in a development of this nature. As the order in question is carried out, however, the security will progressively lose its character as a tract and become more and more an aggregation of non-contiguous lots saleable in a different market to a totally different class of potential purchasers.

What the bankruptcy court is attempting to do, whether it realizes it or not, is tantamount to ordering that Metropolitan's lien be transferred from the security for which it contracted to some other security. Sup-

pose, for example, that included among Williams' assets was an oil refinery of a value equal to or greater than the value of the subject tract. Would the bankruptcy court be empowered to release the land from Metropolitan's deed of trust and substitute the oil refinery in its place? Clearly not.

Metropolitan has no assurance that the selling program contemplated by the bankruptcy court will be successfully consummated. If the receiver should elect to give up somewhere in the middle and permit Metropolitan to look to the lots for satisfaction of the remaining indebtedness to it, Metropolitan's only recourse would be to foreclose on a security which is different than that for which it initially bargained. Metropolitan submits that just as the lender who lends on a tract of lots may not be forced to accept an oil refinery in its stead, neither may a lender who lends on a piece of property subject to development as a tract be forced to look to an aggregation of non-contiguous individual lots left over after an unsuccessful sales campaign to satisfy its claim. For additional discussion of the effect of this order upon Metropolitan, see Section 3, *infra*).

Furthermore, Metropolitan's loan to Williams was not, under the terms of their agreement, to remain outstanding indefinitely. Rather, it was to have a duration of approximately eight months, commencing on March 25, 1965, and terminating on or before November 1, 1965 [Ex. A]. When November 1 came, Metropolitan was entitled to be repaid its principal and accrued interest.

The length of the loan was a matter of considerable importance both to Metropolitan and to Williams. Other considerations aside, it fixed the return which

Metropolitan could realize on the loan for the period of its existence, so that if interest rates rose Metropolitan would be precluded from putting out its money at a higher rate. It is not unlikely that had the duration of the loan been longer, the rate of interest which it bore would have been higher.[6]

What the referee has done here, in effect, is to rewrite the contract between Metropolitan and Williams to extend the loan from eight months to such period as may be required to sell off the lots. In other words, instead of an eight-month loan, Metropolitan now has a three, four or five-year loan.[7]

The fact, so heavily relied upon by the Court below, that presumably Metropolitan would receive interest during the entire period does not legitimate the orders in question. Suppose a tenant leases a building for one year at a fixed monthly rental. Can he insist upon remaining in the premises so long as he continues to pay that monthly rental? What Williams did in this

---

[6]While the note does contain a provision that the loan was to continue to bear interest after maturity in the event that it was not paid off in accordance with its terms, this was merely designed to compensate Metropolitan for the use of the funds during the interim between maturity of the loan and foreclosure of the deed of trust. In no sense does it defer Metropolitan's right to repayment.

[7]Metropolitan, of course, recognizes that a bankruptcy court has the power to restrain a secured creditor from foreclosing its lien (see Section V. 2. *infra*). But this is only a procedural power enabling the bankruptcy court to preserve the *status quo* and prevent interference with the exercise of its jurisdiction. [See *In re Lustron Corp.*, 184 F. 2d 789, 794 (1950)]. Restraining a secured creditor from foreclosing its lien in order to give the bankruptcy court an opportunity to sell the debtor's equity in the property subject to the lien or arrange a judicial sale which will result in a prompt pay-off of the secured creditor is something far different from rewriting the loan so that the secured creditor is compelled to wait years for repayment.

case was to "lease" the use of a given sum of money for a given period. The "lease" has now expired and Metropolitan wants its money back.[8]

2. The Order Restraining Metropolitan From Foreclosing Its Deed of Trust Should Be Vacated Because There Is No Realizable Equity in the Property Subject Thereto to Be Preserved.

Metropolitan recognizes that the bankruptcy court has the power to restrain a secured creditor from foreclosing its lien on property in the possession of the bankruptcy court. This power is necessary in order to permit the court to discharge its obligations and prevent interference with its jurisdiction. *In re Jersey Island Packing Co.*, 138 Fed. 625 (9th Cir. 1905). Nonetheless, the court's power to restrain a secured creditor from foreclosing may be exercised only when to do so will secure some definite benefit for the debtor's estate—normally, the preservation of an equity. For the court to restrain foreclosure in the absence of

---

[8]The outrageous effect of the order in question is somewhat obscured by the fact that Metropolitan is an institutional lender engaged in the business of lending money. Suppose, however, that the order in question applied not to Metropolitan Savings and Loan Association, who had lent Williams approximately a million dollars, but to a 70-year old widow who had lent him $10,000. Could it be reasonably contended that because she would be receiving interest on her loan during the entire period that the widow's substantive rights were not impaired by orders restraining her from foreclosing her security and requiring her to wait four or five years for the return of her money? Metropolitan submits that its position is no different. The widow may want the money to pay for an operation, to finance a grandchild through college, or even to lend to someone else. Metropolitan may want the money to refurbish its offices, to increase the salaries of its employees, or to lend to someone else. The point is that both have lent money for a particular period of time and both expect the money back at the end of that period.

a showing that there is a realizable equity in the encumbered property, or some other equally persuasive reason to do so, is an abuse of discretion.

Kimmel v. Crocker, 72 F. 2d 599, 601 (10 Cir. 1934);

Bushong v. Theard, 37 F. 2d 690, 692 (5 Cir. 1930).

In the instant case, the bankruptcy court's order restraining Metropolitan from foreclosing its deed of trust was predicated upon the finding that Williams, the debtor, had a substantial equity to be preserved [C. T. p. 69, lines 31-32], and unless Williams in fact has such an equity which is realizable for the purpose of the arrangement sought herein, no purpose whatever is served by restraining Metropolitan from foreclosing.

The burden of proving the existence of such an equity was upon the respondents and they have failed to meet it [Title 11 U.S.C.A. §714; *In re Tracy,* 194 F. Supp. 293 (1961)]. There is no reasonable prospect that any equity whatever can be realized from the sale of the subject property above Metropolitan's encumbrance thereon. There was absolutely no evidence adduced at the hearing before the referee that the lots, if sold as a tract, would produce a sum in excess of the obligation of Metropolitan's lien. Indeed, all of the evidence which was introduced indicated quite the contrary. Yet the only way in which, under the terms of the deed of trust binding upon the receiver, the bankruptcy court has the power to sell the lots free of liens is as a tract. A sale of the lots individually, subject to Metropolitan's lien, would obviously not be feasible; each lot would be subject to an encumbrance of approximately

one hundred times its value. A sale of the lots individually, free and clear of Metropolitan's lien, would impair Metropolitan's contractual rights and therefore is beyond the jurisdiction of the bankruptcy court to order [see Section V 1, *supra*]. In short, since the property cannot legally be sold for a sum which will produce an equity for Williams' unsecured creditors, the order restraining Metropolitan serves no valid purpose and its issuance was an abuse of the discretion of the bankruptcy court.

3. The Orders in Question Should Be Vacated Because Their Implementation Will Result in Substantial Injury to Metropolitan.

The arguments advanced in Sections V 1 and V 2 hereof compel reversal of the orders in question. But even if there were some realizable equity in the property to be preserved for the benefit of Williams' creditors, and even if a partial reconveyance of the land would not result in an impairment of Metropolitan's substantive contractual rights, the result of this review would still have to be the same for the reasons set forth below.

The bankruptcy court does not, in a Chapter XI proceeding, have the power to order a sale of property free of liens or restrain a secured lienholder from foreclosing upon his security when to do so would result in substantial injury to the lienor:

> "A Chapter XI proceeding may arrange only the rights of unsecured creditors, without alteration of the rights of secured creditors. . . . The Court has the power to restrain sale of the property in question under the deeds of trust, only if necessary

to facilitate the primary purpose of this proceeding, *and if it does not cause substantial injury to the lienor* [citation]." [*In re Tracy* (1961) 194 F. Supp. 293, 295; emphasis added].

". . . the power [to sell free of liens] will not be exercised unless it is made to appear that *there is a fair prospect of the property being sold for substantially more than enough to discharge the lien or liens upon it.* . . . The court must be satisfied that a sale will be to the interest of the general creditors and not injure the lienholders. . . ." [*Hoehn v. McIntosh,* 110 F. 2d 199, 202 (6th Cir. 1940; emphasis added)].

Let us consider the impact of each of the orders:

A. The Order Restraining Foreclosure.

Here, even assuming that the sales projection of Samuels and the other witnesses for the receiver were correct and further assuming that Metropolitan ultimately will recover every penny of interest and principal to which it is entitled under its note and deed of trust, nonetheless the injury to Metropolitan from the order restraining foreclosure will be substantial.

The Court of Appeals for the Seventh Circuit, in *In re Holiday Lodge, Inc.,* 300 F. 2d 516 (7th Cir. 1962), recently took cognizance of the adverse consequences to a savings and loan association which can flow from the prolonged restraint of a foreclosure proceeding:

"We are not unaware of the natural effect of a prolonged interference with a foreclosure proceeding brought by a savings association, such as appellant in this case. It amounts to a freezing

of assets, while it is in effect, a condition which is not consistent with that degree of liquidity requisite in any financial organization engaged in the acceptance of investment of the funds of many members of the public." (300 F. 2d 520).

Not specifically alluded to by the Court of Appeals, but of immense significance to Metropolitan as a savings and loan association, is the fact, of which the Court can take judicial notice, that the loan would constitute a "scheduled item", as that term is defined by appropriate governmental regulations,[9] for the period in question.

The avoidance of scheduled items is of primary concern to a savings and loan association for a variety of reasons. The ratio of scheduled items to the association's assets is commonly regarded as an index of financial strength, a high ratio tending to discourage investment in that particular association. It is no answer for that association to reply that it is restrained from disposing of the asset, or that the bankruptcy court found the loan to be adequately secured. The adequacy of security is of no moment where a loan is seriously delinquent; it is the delinquency itself which causes the item to be scheduled and it is the scheduling of the item which causes injury to the association.

---

[9]Scheduled items" are defined by §561.15 of the Rules and Regulations for Insurance of Accounts of the Federal Saving and Loan Insurance Corporation as including, *inter alia:*

> "(a) Slow loans (other than insured or guaranteed loans . . .)".

"Slow loans", in turn, are defined in §561.16 of the aforementioned regulations, as including, *inter alia*:

> "(b) Any loan or land contract that is from 1 year to 7 years old and which is the equivalent of 90 days (three months) or more contractually delinquent . . ".

Another consequence of an asset becoming a scheduled item is that the savings and loan association's ability to borrow from the Federal Home Loan Bank Board—a vital source of its credit—is impaired. Federal Home Loan Bank Board Bulletin No. 168, dated January 13, 1965, provides:

> "Whereas the Board of Directors of this bank deems it advisable to establish a general policy regarding limitations to be applied by the bank with respect to lines of credit extended to the member institutions having a ratio of scheduled items to total assets of over 4 percent.
>
> "Resolved that credit for other than net withdrawal purposes to applicant members having scheduled items at a ratio of over 4 percent to total assets to be restricted as follows:

Ratio of Scheduled Items to Total Assets	Credit for Other than Net Withdrawal Purposes
Over 4% - 5%	14% of Savings
Over 5% - 6.5%	10% of Savings
Over 6.5% - 7.5%	7.5% of Savings
Over 7.5%	5% of Savings"

In other words, an association need only have scheduled items of four percent (4%) in order to have a limitation placed upon its capacity to borrow from the Federal Home Loan Bank Board. The loan which is the subject of these proceedings is one of approximately one million dollars. The consequences are obvious.

B. The Order Authorizing the Sale of the Lots Individually Free of Metropolitan's Lien.

The objection of Metropolitan to a sale free of its lien is based upon a great deal mort than a desire to preserve an abstract contractual right, significant though that may be; the fact is that the sale of the lots separately, free of Metropolitan's lien, will inflict upon Metropolitan grave and onerous burdens and risks.

In effect, the bankruptcy court's order fundamentally alters the character of the security. At the present time, the security for the indebtedness to Metropolitan consists of a tract of lots. A tract may be sold for development as an integrated community. The purchaser may wish to develop the tract in accordance with a uniform architectural style, or base the development upon a special pattern of land use, or do any number of things which can only be done with a tract and which becomes progressively less feasible as lots are sold off. Yet it is almost a certainty that, as the sales authorized by the Court's order proceed, the security will increasingly lose its character as a tract and, more and more, become an aggregation of individual lots. At some point, a sale of the property as a tract will be precluded.

It is true, of course, that this change in the character of the security will itself not cause detriment to Metropolitan if, in fact, all the lots are sold *and* sold for an aggregate sum sufficient to fully pay off its loan. But suppose that, at some point in the sales program,

it becomes apparent that the sale of the security will not produce a surplus in excess of the amount due to Metropolitan. The fact that a court reasonably finds that a property can be sold for an amount in excess of the lien upon it does not assure the secured creditor that it will be sold for such amount. *In re Beardsley,* 38 F. Supp. 799, 803 (D.C. Md. 1941). Should the receiver decide to abandon the sales effort and turn over the remaining security to Metropolitan, Metropolitan will have a security which it can no longer sell as a tract. It will be compelled to continue the liquidation proceeding on a single lot basis—at a time when, by the fact of abandonment, it is reasonably certain that a surplus cannot be realized and that, possibly, a loss will be sustained.

Moreover, it may very well be, and indeed probably would be, that the lots ultimately returned to Metropolitan would be the least desirable and least saleable in the tract. Metropolitan would then be in the position of having the balance of its indebtedness secured by the worst of the security—hardly either a fair or desirable situation.

In short, an analysis of the facts of this case in the light most favorable to Respondents compels the conclusion that any benefit which may be derived for the unsecured creditors from the orders in question will be at the cost of far-reaching and substantial injury to Metropolitan.

VI.

CONCLUSION.

For the foregoing reasons, Petitioners submit that the decision of the Court below should be reversed, with directions to vacate the referee in bankruptcy's order restraining Metropolitan from foreclosing its deed of trust and order authorizing the sale of the lots subject thereto free and clear of Metropolitan's lien.

Respectfully submitted,

McKenna & Fitting,

Daniel N. Belin,

Aaron M. Peck,

By Aaron M. Peck,

Attorneys for Appellants Metropolitan Savings and Loan Association and Fidelity Service Corporation.

Certificate of Counsel.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

AARON M. PECK

No. 22366

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

METROPOLITAN SAVINGS AND LOAN ASSOCIATION, a corporation, and FIDELITY SERVICE CORPORATION, a corporation,

Appellants,

vs.

WILLIAMS CONSTRUCTION CO., a corporation, and A. J. BUMB, Receiver,

Appellees.

ANSWERING BRIEF OF APPELLEE WILLIAMS CONSTRUCTION COMPANY.

BAKER, ANCEL AND REDMOND,
By MARK G. ANCEL and
DAVID J. MORRIS,

626 Wilshire Boulevard,
Los Angeles, Calif. 90017,

Attorneys for Appellee
Williams Construction Company.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

Page

I.

Statement of Jurisdiction 1

II.

Statement of the Case 2

III.

Summary of Issues and Arguments 5

A. The Court Has the Power to Order a Sale of Property, Subject to an Encumbrance, Free of That Encumbrance When the Value of the Property Exceeds the Value of the Encumbrance by More Than a Third of a Million Dollars 5

B. The Court Has the Power to Determine the Manner in Which the Judicial Sale Shall Be Conducted—That Is, Whether the Property Shall Be Sold in Bulk, or in Parcels or Lots.. 6

IV.

Argument 8

1. The Bankruptcy Act Empowers the Court to Order a Sale of Encumbered Property Free and Clear of All Claims, Liens, and Encumbrances 8

2. The Bankruptcy Court Has the Power to Decide Whether a Sale Free of Encumbrances Should Be in Bulk or in Parcels or Lots 12

3. There Is a Substantial Equity in the Property Which the Bankruptcy Court Can Recover for the General Creditors by Ordering a Sale Free of the Encumbrances 19

Page

4. The Effect of a Release Clause in a Case Involving a Receiver, or Otherwise Involving the Rights of Third Parties, Has Not Been Determined Under California Law, and There Is Reason to Believe That a Presence of Equitable Considerations Would Induce a California Court to Give Effect to a Release Clause in Such a Circumstance 23

V.

Conclusion 26

TABLE OF AUTHORITIES CITED

Cases — Page

Arizona Power Corp. v. Smith, 119 F. 2d 888 9

Bradbury v. Thoms, 135 Cal. App. 435 ....23, 24

Conley v. Poway Land and Inv. Co., 232 Cal. App. 2d 22 25

Continental Illinois National Bank and Trust Company v. Chicago R. I. & P. Railroad, 294 U.S. 648, 55 S. Ct. 595, 79 L. Ed. 1110 21

Gardner v. New, 329 U.S. 565, 91 L. Ed. 516, 67 S. Ct. 473 9

Keet, In re, 128 Fed. 651 20

Louisville Bank v. Radford, 295 U.S. 555 9

Masten v. Fox West-Coast Theatres, 117 Cal. App. 303 19

Monroe County Bank v. Dreher, 88 F. 2d 288 21

National Grain Corp., Matter of, 9 F. 2d 802 20

S.F.L. Company v. Whaley, 50 Cal. App. 125 ....24, 25

Van Huffel v. Harpelrode, 284 U.S. 225, 76 L. Ed. 256 9

Statutes

United States Code, Title 11, Sec. 47 1

United States Code, Title 11, Sec. 67(c) 1

United States Code, Title 11, Sec. 110 20

United States Code, Title 28, Sec. 1334 1

United States Constitution, Art. 1, Sec. 8 10

Textbooks

120 American Law Reports, p. 921 9

Bankruptcy Act, Sec. 70a(5) 20

Collier on Bankruptcy, Sec. 70.01, p. 930 22

Collier, Bankruptcy Manual, Sec. 70.54, p. 1053 ....9, 20, 21

4A Collier on Bankruptcy, Sec. 70.03 20

4A Collier on Bankruptcy, Sec. 70.12(2) 20

4A Collier on Bankruptcy, Sec. 70.52 20

4A Collier on Bankruptcy, Sec. 70.53 20

4A Collier on Bankruptcy, Sec. 70.97(2), p. 1131 .. ..9, 20

4A Collier on Bankruptcy, Sec. 70.97(4), p. 1143 .. 13

4A Collier on Bankruptcy, Sec. 70.98(6), p. 1159 .. ..9, 13

4A Collier on Bankruptcy, Sec. 70.98(11), p. 1165 .. 9

4A Collier on Bankruptcy, Sec. 70.99(1) pp. 1214-1215 20

4A Collier on Bankruptcy, Sec. 70.99(3), p. 1214 .. 9

4A Collier on Bankruptcy, Sec. 70.99(5), p. 1222 .. 13

No. 22366

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Metropolitan Savings and Loan Association, a corporation, and Fidelity Service Corporation, a corporation,

Appellants,

vs.

Williams Construction Co., a corporation, and A. J. Bumb, Receiver,

Appellees.

ANSWERING BRIEF OF APPELLEE WILLIAMS CONSTRUCTION COMPANY.

I.
STATEMENT OF JURISDICTION.

This is an appeal from a decision of the United States District Court for the Central District of California on the review, pursuant to 11 U.S.C. §67(c), of orders of a Referee in bankruptcy in the District Court of the Central District of California. Jurisdiction was had pursuant to 28 U.S.C. §1334, which provides:

> "District Courts shall have original jurisdiction . . . of all matters and proceedings in bankruptcy."

Jurisdiction over this appeal is conferred upon this Court by 11 U.S.C. §47.

The appellee herein urges this Court to affirm the decision of the lower court.

II.
STATEMENT OF THE CASE.

Appellee, Williams Construction Co., a corporation, is a debtor in a proceeding in the Bankruptcy Court under Chapter XI of the Bankruptcy Act. Appellee, A. J. Bumb, is the duly appointed and qualified receiver of Williams Construction Co. in the Bankruptcy proceedings.

Williams is a land developer having acquired the tract in 1963 that is in question on this appeal. Williams subdivided the property into 129 lots, of which 20 have been sold. The remaining lots owned by Williams consist of 109 lots. The sales prices of the lots that have been sold range between the sum of $12,500.00 and $15,000.00. [C. T. pp. 70-71]

Williams fully improved the lots in question. The lots overlook a fully developed golf course and are quality lots. They range in elevation from 590 feet to 720 feet. The lots are within a mile of the extension of the Pomona freeway, and within a mile and a half of a shopping center. All of the streets in the tract have been paved, the curbs and gutters put in, and the underground utilities installed. The area is zoned for single family residential use [R-1-8500]. [C. T. p. 69]

The highest and best use of the lots owned by Williams is for single family residence use which is consistent with the general development and zoning of the area. The size of the lots varies between 8500 square feet and 14,400 square feet. The lots present an inter-

esting variation of approach, shape, elevation, views and probable development. At least nine of the lots previously owned and sold have been fully improved with residences. The tract is located in the unincorporated community of Walnut Valley in the Southeast portion of the San Gabriel Valley in Los Angeles County and is south and adjacent to Fifth Avenue about 1500 feet west of Brea Canyon Cut Off. The exact tract number is 28140. [C. T. pp. 69-70]

The property was appraised by the estate's appraiser, Sam Jonas, for the total sum of $1,362,500.00 on September 30, 1966, which works out to an average of $12,500.00 per lot [R. T. p. 15, line 24]. The appellant's appraiser, Taylor Dark of Marshal and Stevens Company testified that the selling price of lots today would be $13,500.00 on an average [R. T. p. 269, lines 2-18]. Dark also testified that the fair market value if the lots were sold individually would be $1,200,000.00 plus [R. T. p. 350, lines 22-23]. The owner, Herald Williams, President of Williams Construction Co., testified that the property was higher in value than $12,500.00 per lot, to wit, $14,000.00 to $16,000.00 per lot [R. T. p. 149, lines 3-4]. The appellant had no other expert testify on value who qualified as such expert. The equity of the appellees was the sum of $366,183.00. [C. T. pp. 42, 43, 71]

The Referee stated the definition of fair market value acceptable to this proceeding when he said

> "[The definition by the United States Supreme Court is] the amount in cash that in all probabil-

> ity would be arrived at by fair negotiation between an owner willing to sell and a purchaser willing to buy given a reasonable time to negotiate." [R. T. p. 393, lines 2-9].

The Referee granted the restraining order by order filed on November 23, 1966. The receiver and debtor brought on an application to transfer lien of the appellants to the proceeds which was heard on November 28, 1966, and an order was granted to the receiver and the debtor dated January 17, 1967. The Referee in granting the order transferring the lien to the proceeds stated

> "That [Metropolitan Savings] will receive the lion's share [of sales proceeds], but I am going to permit the receiver in this case to keep a small amount of what is received from those individual sales merely to cover the administrative costs of these proceedings; possibly five percent, certainly not more than ten percent in any sale until there has been enough of this property sold to put your client in a position where the default has been cured." [R. T. p. 14, lines 8-17 of November 28, 1966 hearing].

The two orders consolidated for review and a Memorandum Opinion dated September 18, 1967, and Supplement to Memorandum, dated September 22, 1967, were entered by the District Court Judge. These matters are here upon appeal.

III.

SUMMARY OF ISSUES AND ARGUMENTS.

We are concerned here with the power of the court, in applying the laws of bankruptcy, to order a sale of property in which the debtor has a substantial interest, free of the encumbrance, and to order the transfer of the lien to the proceeds.

The issues most narrowly stated are:

1. Whether the court has the power to order the sale.
2. If so, whether the court has the power to determine the manner of the judicial sale—that is, whether it should be a sale in bulk or in parcels or lots.

But what in fact will be decided by this court is whether the debtor and a substantial number of general creditors, all of whom are creditors because of work done and materials furnished in the manufacture of the 109 lots, and all of whom are directly responsible for the value the property now enjoys, are going to be paid, or whether the appellant is going to be allowed to enrich itself far beyond the amount of its security.

A. The Court Has the Power to Order a Sale of Property, Subject to an Encumbrance, Free of That Encumbrance When the Value of the Property Exceeds the Value of the Encumbrance by More Than a Third of a Million Dollars?

The federal bankruptcy act empowers the court to order a judicial sale of a debtor's property free of an encumbrance when the secured creditor can be protected

by a transfer of its lien to the proceeds and such a sale will result in a benefit to the general creditors. Ordinarily the sale is to recover equity in the property, but there is a well established line of cases allowing such a sale even where the presence of an equity is doubtful. In the instant case the value of the property exceeds the value of the encumbrance by more than a third of a million dollars, and the presence of equity is well established. There are, in addition, numerous general creditors whose debts were incurred in connection with the transformation of the property into 109 separate lots. Hence there is more than adequate basis for the exercise of the power to order a judicial sale.

The power of the court to order a judicial sale is a derivative of federal law and is not merely a power acquired by reason of subrogation to those rights of the debtor created by the sovereignty of the state. The Receiver can exercise all rights acquired by subrogation, but these rights are separate from, and in addition to, the power of the court.

B. The Court Has the Power to Determine the Manner in Which the Judicial Sale Shall Be Conducted—That Is, Whether the Property Shall Be Sold in Bulk, or in Parcels or Lots.

The power to sell includes the power to determine the manner in which the sale should be held. The sale should, of course, be such as will bring the highest possible return from the property.

On the basis of more than 400 pages of testimony, the court concluded that as of September 30, 1966 the fair market value of the property was $1,362,500.00 and that the encumbrance was not more than $996,-

317.00. It also concluded that it would be in the best interest of the general creditors that the lots be sold separately with a transfer of the lien to the proceeds, and that a sale in this manner would in no way impair the substantive right of the secured creditor.

The Court was well within the limits of its power, and absolutely correct in its disposition of the matter. Its order is entirely consistent with the expectations of the parties. These lots were fully manufactured, with installed underground utilities. The curbs were installed and the streets paved. The area was zoned for single family dwellings and some of the lots had already been sold and had houses constructed on them. The parties intended that they be sold separately, and the release clause which the appellant relies on was designed to facilitate individual sales. The appellant attached a separate value to each, and the court indicated its intention to give the appellant even more than this fixed value from the sales as they take place.

There is no evidence that a lot by lot sale will impair the appellants' security. The appellant has speculated that it will be injured if only a portion are sold. But there is no evidence to this effect. Nor is there evidence that all the lots cannot be sold, or that any unsold lots will have a reduced value. On the contrary, it could be speculated that the value of the lots will increase as more and more are sold.

The evidence fully supports the findings of fact and the conclusions of law, and the orders should be affirmed.

IV.

ARGUMENT.

1. The Bankruptcy Act Empowers the Court to Order a Sale of Encumbered Property Free and Clear of All Claims, Liens, and Encumbrances.

The Bankruptcy act empowers the court to order the sale of all or any part of a bankrupt's property free of an encumbrance. This is an equitable power conferred on the court by the Federal Bankruptcy Act and is discussed in the Collier Bankruptcy Manual, under the section entitled "Sale Free of Liens and Encumbrances", as follows:[1]

> "The Bankruptcy Court (which includes the Referee) has the power to sell encumbered property free of all valid claims, liens and encumbrances, provided, in general, that the Bankruptcy Court has the actual or constructive possession of the property involved. Whether or not this power should be invoked is for the Trustee (or Receiver) to decide. [Footnote: The Court must exercise its discretion in ordering the sale after a determination of all relevant factors. *In re Bernard Altman Int'l Corp.*, 226 F. Supp. 201 (S.D.N.Y. 1963)].
>
> "In a petition for an order to sell free of liens and encumbrances, it must, as a rule, be shown that there is a benefit to be expected for the general creditors; that is, a surplus over and above the total amount of encumbrances and sale expenses. [Footnote to citations.] In exceptional cases, however, a sale free of liens may also be justified

---

[1]The Collier Bankruptcy Manual is under the editorship of a leading authority, Professor William T. Laube, of the law School of the University of California at Berkeley.

where the encumbrances equal the value of the property, and, where, for instance, the validity of some of the encumbrances is questioned, [Footnote to citations] or for reasons of a more expeditious and less expensive liquidation. [Footnote to citations]. The Bankruptcy Court may sell free of liens in some situations even though there may be some doubt as to whether or not there is any equity in the property for the unsecured creditor. [Footnote to following citations: *Matter of Hout,* 26 Am.B.R. (N.S.) 360, 9 F. Supp. 419 (D.C. Pa.); *Goggin v. Division of Labor Law Enforcement,* 336 U.S. 118, 69 Sup. Ct. 469, 93 L.Ed. 543 (1949)]." Collier, Bankruptcy Manual §70.54 (p. 1053).

This power is also discussed by the American Law Reports Annotated, in an extensive annotation. "Power of Court to Authorize or Direct Receiver (or Trustee in Bankruptcy) to Sell Property Free From Liens", 120 A.L.R. 921. See also:

Van Huffel v. Harpelrode, 284 U.S. 225, 76 L. Ed. 256 (1931);

Louisville Bank v. Radford, 295 U.S. 555, 583-584 (1935);

Gardner v. New, 329 U.S. 565, 576, 91 L. Ed. 516, 67 S. Ct. 473 (1946);

Arizona Power Corp. v. Smith, 119 F. 2d 888, 890 (9th Cir. 1941);

4A Collier on Bankruptcy, §§70.97[2] (p. 1131); 70.98[6] and [11] (pp. 1159 and 1165), and 70.99[1], [3], (p. 1214 *et seq.*).

On the basis of evidence presented, Referee Kinnison made the following Findings of Fact, *inter alia:* That

the property in question is subject to a Deed of Trust; that the fair market value substantially exceeds the amount of the encumbrance, that there is a substantial equity in the property; that the Debtor has certain unsecured creditors; that a sale of a lot free and clear of the lien will in no way impair the substantive rights of the secured creditor; that a sale of lots separately will bring a greater return than the sale of the lots as a unit; that it is in the best interest of the creditors that the lots be sold individually and the lien be transferred to the proceeds of such sale. Findings of Fact and Conclusions of Law, 5, 6, 7, 8, 9, 10, 11, 12 and 13 [C. T. pp. 69-70]. These Findings of Fact are well supported by the evidence and more than justify the court in exercising its power to order a foreclosure proceedings to be enjoined, and to allow a judicial sale of the lots, individually or in bulk, with a transfer of the encumbrance to the proceeds.

The source of the power of the court to order a sale of encumbered property should be carefully examined. The sale is an exercise of that power delegated by the states to the federal government at the time of the adoption of the federal constitution, which is embodied in Article 1, Section 8 of the United States Constitution. The sovereignty of the state did not, and has not, retained power to limit that which it delegated. The sale is not an exercise of a power acquired by reason of subrogation. The court is exercising a direct power over the property derived from federal law; it is not a derivative of state law.

In the last analysis, it would appear that the appellant concedes this. Appellant's real argument is not that the power to sell the lots individually does not

exist, but only that it would not be a realistic economic possibility to make such sales because "each lot would [necessarily] be subject to an encumbrance of approximately one hundred times its value[2] (Appellant's Op. Br. pp. 26-27).

Of course, if the security agreement itself creates special additional powers in the bankrupt, the trustee or receiver will be empowered to exercise those rights in the same manner the bankrupt could exercise the rights. But what is important here is to note that there are potentially two ultimate sources of power under which a sale free of the encumbrance can be made. Whether one or both exists in any given situation will depend on various questions of fact. This distinction may be illustrated by noting that, any time a bankrupt has encumbered property, there is a possibility that it can be sold free of the encumbrance, whether or not there is a release clause provision in the particular security agreement. Therefore, it cannot be said that the power to sell derives from the release clause.

Perhaps the appellants analysis is clouded with the hope that, should the court cause the property to be sold as a unit, it will eventually be able to bid in the amount of the security, obtain title to the various parcels, and then itself resell them on a lot by lot basis. The realization of this potential third of a million dollar profit is no doubt attractive. But should this excess

[2]"Yet the only way in which, under the terms of the deed of trust binding upon the receiver, the bankruptcy court has the power to sell the lots free of liens as is a tract. A sale of the lots individually, subject to Metropolitan's lien, would obviously not be feasible; *each lot would be subject to an encumbrance of approximately one hundred times its value.*" (Emphasis added). (Appellant's Op. Br. pp. 26-27).

value go to the appellant, whose investment under any analysis is secured, or should it go to the existing unsecured creditors who have created the value that exists in the property by cutting lots out of raw acreage, installing the curbs, paving the streets, putting in the underground utilities, and carrying out all of the other activities requisite to manufacturing lots? It is the obligation, the responsibility, and the ultimate purpose of the bankruptcy court to recover the value for these general creditors, who will otherwise lose everything.

2. The Bankruptcy Court Has the Power to Decide Whether a Sale Free of Encumbrances Should Be in Bulk or in Parcels or Lots.

The power of the court to order a judicial sale of the lots free of the encumbrance includes the power to determine the manner in which the sale will be conducted—that is, whether it shall be a sale in bulk or in parcels or lots. If the facts indicate that a much higher price can be obtained from a sale in parcels or lots, then the court has an obligation to order that kind of sale.

Volume 4A, Collier on Bankruptcy, under the section entitled "Practice in Bankruptcy Sales", discusses this power as follows:

> "[6] Sale in Bulk or in Parcels.
>
> The order of sale should likewise specify the manner in which the property should be offered for sale—that is, in bulk, or in parcels, or lots. Creditors may express their wishes, the advice of the Receiver or Trustee will carry considerable weight, but the final decision is with the Bankruptcy Court. [Footnote: *Matter of Columbia Iron*

> *Works,* 14 Am. B. R. 526, 142 Fed. 234 (D.C. Mich.)] The court may, however, by local rules, leave it to the discretion of the Receiver or Trustee to direct a sale in bulk or a sale in lots. Where some assets are encumbered with liens, it may be difficult properly to apportion the proceeds to the liens on the various parcels or lots, unless they are sold separately." 4A Collier on Bankruptcy §70.-98[6] (p. 1159).

See also 4A Collier on Bankruptcy §§70.97[4] (p. 1143) "Analysis of Power to Sell", and 70.99 [5] (p. 1222) "Sale Free of Liens and Encumbrances".

Whether there shall be a sale, and, if so, what kind, are questions of fact to be decided on the basis of the evidence.

In the instant case, after a hearing on the application to transfer the lien to the proceeds, the Referee made the following findings of fact:

> "[8] That there is a substantial equity of the Debtor in the said property.
>
> "[9] That the Debtor has certain unsecured creditors.
>
> "[10] That the sale of lots separate will bring a greater return than the sale of lots on a wholesale basis. That said lots should be sold so as to obtain the highest possible price. (*Louisville Bank v. Radford* [1934], 295 U.S. 555, 584, 79 L. Ed. 1593, 55 S.C. 854.).
>
> "[11] That it is in the best interests of the general creditors that said lots be sold separately, rather than on a wholesale basis." Findings of Fact and Conclusions of Law, 8-11." [C. T. pp. 69-70].

These findings of fact are supported by the expert testimony of several competent appraisers.

The court entered an order that was not only well within the scope of the proper exercise of its power, but was fully consistent with the intentions and the expectations of the parties at the time they entered the agreement. The security consisted of 109 separate, clearly defined, and fully improved lots. The streets had been paved; the curbs, gutters and underground utilities installed. The appellant itself valued each lot separately, and an examination of the trust deed reveals that the values were rather evenly distributed within the $8,000.00-$10,000.00 range [C. T. p. 4]. They were intended to be sold individually; some in fact had already been sold. The release clause was designed to facilitate such sales.[3]

The court is not dealing with a circumstance in which untouched acreage is to be arbitrarily portioned off at the whim of the Referee, so that perhaps a filling station could be constructed in the middle of what might otherwise be developed into a golf course. On the contrary, this is, in principle, akin to a situation in which two lots located in separate parts of the state are pledged to secure a note to which there remains unpaid an amount less than the value of both lots. In

[3]It should be noted that the Referee intends to afford the appellant even more protection than simply the value it has attributed to the various lots. To quote from the opinion of the honorable Judge Whelan, quoting in turn the Referee: "As a practical matter, you have a release price there, it may be $8,000.00, and the sale price is $13,500.00. As a practical matter, I would require the payment of a substantial portion of the $13,500.00 to Metropolitan; not the $8,000.00. I would leave a small portion of it to the Receiver to carry on the expenses of administration of this estate, but the lion's share would go on that encumbrance to reduce that encumbrance" [C. T. p. 161].

such a circumstance, the court would certainly be correct in selling the lots separately.

The character of the property with which the Court was dealing is perhaps best summarized by quoting from the findings of fact entered pursuant to the application to stay the foreclosure proceedings. They are, in part, as follows:

> "[1] That Williams Construction Company, a California corporation, is the owner of the following described real property:
>
> Lots 1, 3, 5, 6, 7, 9, 10, 11, 13, 14, 18, 20 through 41, inclusive, 43 through 51 inclusive, 53 through 73 inclusive 78 through 86 inclusive, 88, 90 through 92 inclusive, 94 through 101 inclusive, and 104 through 128 inclusive, of Tract No. 28140, as shown in Map Book 709, pages 86 to 91 inclusive, Los Angeles County Recorder's office.
>
> "[2] The number of such lots owned by Williams is 109 lots which are fully improved lots in a subdivision zoned R1-8500, a single family residence zoning permitting subdivision development with a minimum lot size requirement of 8500 square feet.
>
> "[3] That the highest and best use of the lots owned by Williams Construction Company is for single family residence use which is consistent with the zoning and general development of the area.
>
> "[4] The tract is located in the unincorporated community of Walnut Valley in the Southeast Portion of San Gabriel Valley, and is south of and adjacent to Fifth Avenue, about 1500 feet west of Brea Canyon Cut Off.

"[5] The range in elevation of the tract goes from 590 feet at the Fifth Avenue entrance to the subdivision to approximately 720 feet along its most southerly lots. The range in lot size is from 8500 square feet to 14,000 square feet.

"[6] The lots present an interesting variation of approach, shape, elevations, views and probable development characteristics.

"[7] All streets in the subdivision are paved and have curbs and gutters; underground utilities have been installed. There are 9 lots in the tract, now owned by Williams Construction Company, which have been improved with residences.

"[8] The lots have been approved by a licensed geological engineer, and there is an easement over lot 48 for ingress." [C. T. pp. 41-42].

Eight of the lots of the original tract were sold in the first six months of 1965, for amounts ranging from $12,500.00 to $15,000.00. Finding of Fact 9 [C. T. p. 43]. These were not in any particular section, but were scattered throughout the tract. Homes have already been constructed on them.

The appellant is now before this court asking for a most unusual order. There has been a finding of fact that the property has a fair market value of $1,362,500.00 [C. T. p. 70]; and that the value of the appellant's encumbrance is no more than $996,317.00 [C. T. pp. 43, 70]. Yet the appellant is asking the court to order a sale which, the appellant has offered to prove, can be expected to net no more than $924,630.00 (Appellant's Op. Br. pp. 4-5).

The appellant has advanced two reasons in support of this request:

1. That if only a portion of the land is sold, there will be an impairment of the remaining security;

2. That there is a potential for injury to it in the form of an impairment of the relationship between the appellant and the Federal Home Loan Bank Board, of which the exact nature and extent is rather vaguely expressed.

To support these contentions, the appellant has offered arguments consisting almost exclusively of speculation. There is evidence in the record to indicate that the value of the property, if the method of sale is a lot by lot sale, is much greater than what the appellant has offered to prove could be the expected return from a "wholesale" liquidation. This is not speculation. There is no evidence to indicate that all of the lots cannot be sold on a lot by lot basis. There is no evidence that the time of the sale would necessarily be "three, four or five year"[s] Appellant's Brief, p. 24. There is no evidence to indicate that the value of the unsold lots will decrease as more and more lots are sold. And there is no evidence in the record relating to a "totally different class [of potential purchasers]." (Appellant's Op. Br. p. 22). If the court wishes to speculate, it might conclude on the basis of the transcript that any unsold lots would have an increasing value, as homes were built on those that were sold. It might also speculate that since the time of the evaluations of record, the cost of manufacturing similar lots has substantially increased, so that there is an even greater equity in the property than appears of record.

Speculation in this case is not only improper, but unnecessary. The bankruptcy court heard several hundred pages of testimony in which the character of the property, its marketability, and the nature of the security agreement were fully examined. At the conclusion, following the hearing on the application to transfer the lien to the proceeds, the court made the following finding of fact:

> "[12] That a sale of the said lots free and clear of the respondent, Metropolitan Savings and Loan Association, *will in no way* impair the substantive right of the respondent." (Emphasis added) [C. T. p. 43].

The bulk of the appellant's opening brief is a re-argument of this factual determination.

The fundamental objection running throughout the appellant's brief is that of the potential time delay involved. The appellee will not join in speculation about this, but will respectfully point out that there is a certain delay inherent in any extension of secured credit to a debtor who may ultimately be compelled to resort to the assistance of the bankruptcy law. Furthermore. the concept of fair market value necessarily implies a reasonable time in which to make the sale.

There is nothing in the record to indicate that any time delay is unreasonable in the circumstances. In fact, the delay thus far may be directly attributed to the activities of the appellant. This matter was first heard in September, 1966. Since that time the appellees have been able to make no sales of the property, not for lack of marketability, but because (and this is a matter of which the court may take judicial notice) the appel-

lants have maintained their encumbrance of record through this appeal, thereby preventing the issuance of any policy of title insurance on the property without setting forth such encumbrance as an exception. The real injury here is to the unsecured creditors whose contributions to the property have created its value. There is more than adequate security to fully protect the appellant. But during this time the property taxes must be paid along with certain maintenance expenses, all of which will reduce the equity. Perhaps interest is also accruing, but the appellee does not concede this because thus far the delay is directly attributable to the appellant.

3. There Is a Substantial Equity in the Property Which the Bankruptcy Court Can Recover for the General Creditors by Ordering a Sale Free of the Encumbrances.

Under the laws of bankruptcy, a federal definition of "equity" is of more significance, but even a California court when called upon to define "equity", for purposes of a fraud action, said:

> "Equity, when used in connection with real estate value, means a clear market value in excess of encumbrances upon a parcel of property." *Masten v. Fox West-Coast Theatres,* 117 Cal. App. 303.

Although this action does not involve fraud, the characterization is fitting.

The Bankruptcy Court made a finding of fact "that there is a substantial equity of the Debtor in the said property." Findings of Fact and Conclusions of Law, 9 [C. T. p. 69]. The dollar amount of this equity,

based on the findings of fair market value, is approximately $366,183.00 [C. T. pp. 43, 44].

The presence of this equity is a more than adequate foundation for the order by the Bankruptcy Court for the sale free and clear of the lien. 4A Collier on Bankruptcy, §§70.97[2], 70.99; Collier Bankruptcy Manual, §§70.03, 70.12[2], 70.52, 70.53, 70.54; Bankruptcy Act, §70a(5), 11 U.S.C. §110. See also Section 1 of the appellee's Argument herein.

Under the Bankruptcy Act, §70a(5), the Bankruptcy Court obtains jurisdiction over the bankrupt's title to

> "property, including rights of action, which prior to the filing of the Petition, he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered. . . ."

The decision whether to issue an injunction prohibiting the foreclosure outside bankruptcy, and/or ordering a sale free of the encumbrance, is within the discretion of the Bankruptcy Court.

In order for the appellant to reach the conclusion that there is no equity, it must overlook a considerable amount of law, both on what constitutes "equity" and on the relationship between the presence of "equity" and the power of the court to order a sale. Among other things it must overlook the basic nature of the power to order a sale free of an encumbrance, as discussed in sections 1 and 2 of the appellee's Argument, herein. It must also overlook the power to sell when there may not be any equity. *Matter of National Grain Corp.*, 9 F. 2d 802, *In Re Keet,* 128 Fed. 651; See generally 4A Collier on Bankruptcy. §70.99[1] (pp. 1214-1215) "Sale Free of Liens and Encumbrances."

The power to sell exists when it can be shown that there is a benefit to be expected for the general creditors. *Monroe County Bank v. Dreher,* 88 F. 2d 288 (3rd Cir.); 4A Collier on Bankruptcy §70.54 (p. 1053). The exercise of the power to order a sale is very much within the discretion of the court, and like any discretionary power, could certainly be abused. But it can hardly be said that the decision to order a sale that could perhaps return approximately $366,183.00 in excess of the value of the encumbrance is an abuse of discretion.

The appellant advances at some length, in support of its dual contentions that there exists neither equity nor power to transfer the lien to the proceeds, the assertion that:

> "In the absence of a specific statutory provision to the contrary, a trustee in bankruptcy acquires no greater interest in the property than belonged to the bankrupt." (Appellant's Op. Br. p. 15).

While this statement contains a large element of undeniable accuracy, it is a misleading oversimplification that is irrelevant to a determination of the controlling issues presently before the court. Its procrustean application to this case would not only ignore the whole equitable nature of the court of bankruptcy,[4] it would

[4]*Continental Illinois National Bank and Trust Company v. Chicago R. I. & P. Railroad*, 294 U.S. 648, 675, 55 S. Ct. 595, 79 L. Ed. 1110, discusses the equitable nature of the courts of bankruptcy in these terms: "[They] are essentially courts of equity, and their proceedings inherently proceedings in equity. . . . The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is, therefore, inherent in a court of bankruptcy, as it is in a duly established court of equity. §252 of the Judicial Code, which authorizes the United States Courts 'to issue all writs not specifically provided for by

(This footnote is continued on the next page)

assume that the court is constrained to recognize only those rights acquired by subrogation; that the parties to a contract can limit the power of the bankruptcy court to determine the manner in which encumbered property can be sold;[5] and that the the narrowest possible limitations, for purposes of bank-concept of "equity" ought to have the narrowest possible limitations, for purposes of bankruptcy law.[6]

To illustrate the degree of oversimplification in the appellant's argument, the appellee refers to the Collier Bankruptcy Manual, wherein, following its discussion of this kind of argument and of some of the equitable powers embodied in the bankruptcy law, the editor concludes:

> "It is quite apparent, therefore, that the Act [Bankruptcy Act] confers certain rights and powers on the trustee over and above those accorded the bankrupt, and, in some cases, the bankrupt's creditors." Collier Bankruptcy Manual, §70.01 (p. 930).

---

statute, which may be necessary for the exercise of their respective jurisdictions' recognizes and declares the principal . . . Moreover, by §2(12) of the Bankruptcy Act, (USC Title 11, Section 11), Courts of Bankruptcy are invested with such authority in equity as will enable them to exercise original jurisdiction of bankruptcy proceedings, including the power to 'make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act.' The Bankruptcy Court, in granting the injunction, was well within its power, either as a virtual court of equity, or under the broad provisions of §2(15) of the Bankruptcy Act or of §252 of the Judicial Code."

[5]Suppose the contract said, for example, that in the event of default all of the debtor's property must be sold at wholesale, or to an institutional buyer, or to people over six feet tall? Would the court be compelled to look to one of these markets alone to determine whether there was an equity in the property?"

[6]A curious result follows the appellant's offered definition. The debtor has a third of a million dollars in equity *if he can pay off the encumbrances in total,* but none if he cannot. The concept of equity was originated to avoid this kind of result.

The appellant has cited a number of cases in support of its contention that the court is limited because the debtor was limited,[7] none of which is controlling. They do not involve a substitution of remedy, nor a determination of the manner in which the property shall be sold. In each the official of the bankruptcy court was asserting rights acquired solely under the terms of the particular contract. As has been demonstrated, in this case the right to sell is a derivitive of the bankruptcy act itself, and is not dependent upon the presence or absence of a release clause in the particular security.

4. The Effect of a Release Clause in a Case Involving a Receiver, or Otherwise Involving the Rights of Third Parties, Has Not Been Determined Under California Law, and There Is Reason to Believe That a Presence of Equitable Considerations Would Induce a California Court to Give Effect to a Release Clause in Such a Circumstance.

The case before this court involves the power of the Bankruptcy Court to order a judicial sale of encumbered property, free of the encumbrance, and to determine the manner of sale appropriate in the circumstances. It does not involve the exercise of a right to sell created by the sovereignty of the state, which the Bankruptcy Court is empowered by reason of subrogation to effect. Therefore, the line of cases cited by the appellant, of which *Bradbury v. Thomas,* 135 Cal. App. 435 (1933) is one, are not determinative of the controlling issue before this court. Nevertheless, since the Referee could also exercise the power which he has acquired by rea-

---

[7]Appellee does not concede the existence of any limitations, See Appellee's Argument, Section 4.

son of subrogation, a brief discussion of the California law is in order.

The first case dealing with release clauses is *S.F.L. Company v. Whaley,* 50 Cal. App. 125 (1920) and it should be read carefully. In this case, the parties did not attempt to place any limitation on the operation of a release clause. The court concluded that the release clause remained in effect after default, and that its exercise did not impair the remaining security. See page 138.

The next case in line is *Bradbury v. Thomas, supra.* Here the security agreement did place a limitation on the effect of a release clause by stating, "Mortgagor, while not in default, shall be entitled to a separate release. . . ." [135 Cal. App. 2d 435, 443]. That case involved only rights as between the mortgagor and mortgagee in an action brought by the mortgagor to quiet title to certain land, after default. This case did not involve a receiver, did not involve a bankruptcy, and did not in any way involve the rights of any parties other than the mortgagor and the mortgagee. There were no equitable considerations before the court, and the court was not unmindful of this, when it said:

> "It is obvious that the appellants relied solely on the release clause of the mortgage. This must be so, for it is the only provision which furnishes any force to their claim that they are entitled to have their title to 15 lots quieted against respondent's mortgage lien. Certainly, if the mortgage had contained no release provision there could have been no pretense on their part that they were entitled to have any of the mortgaged premises declared free from the mortgage lien." 135 Cal. App. 2d 435, 442.

In the present case, in the absence of a release provision, it is rather clear that the court could have ordered a sale in parcels or lots.

The most recent case involving a release clause is *Conley v. Poway Land and Inv. Co.,* 232 Cal. App. 2d 22 (1965). In this case also there was a release clause conditioning the right to retain the release

> "so long as the trustor be not in default concerning any of the covenants contained herein or with respect to the payments due on the promissory note secured thereby, . . ." At page 25.

Six months after default, the debtor requested and obtained a reconveyance of approximately 15 acres. The payment of principal, for which this acreage was released, had been made nine months prior to the default, and fifteen months prior to the actual reconveyance. At the time of the payment, however, there had been no request for a reconveyance, nor apparently any other effort to obtain one. Although the higher court could have set this reconveyance aside, it did not. The lower court was reversed and the debtor was allowed to obtain the reconveyance while in default.

The cases discussed stand for the proposition that the California courts have considered the situations on an ad hoc basis and no conclusion can be made that in a factual situation similar to the one here the courts would not permit sale of individual lots, particularly in view of rationale of *Whaley.* In the *Whaley* case the courts allowed a conveyance after default. If, as a matter of law, this would have been damaging to the remaining security, surely they would not have done so.

There is no California case involving a receiver, a bankruptcy, or otherwise involving the rights of third

parties in which it has been necessary to decide what effect must be given a release clause. A trusteeship or receivership presents a significantly different case. These offices, whether created by state or federal law, are equitable in nature and designed to protect the rights of third parties. In a case in which the rights of the secured creditors can be protected, and the rights of third parties are at issue, there is considerable reason to believe the California courts would give effect to a release clause.

V.
CONCLUSION.

For the foregoing reasons, the Appellee Williams Construction Company submits that the decision of the Court below is correct in every respect and should be affirmed.

Respectfully submitted,

Baker, Ancel and Redmond,
By Mark G. Ancel and
David J. Morris,
Attorneys for Appellee Williams Construction Company.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Mark G. Ancel

No. 22366

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

METROPOLITAN SAVINGS AND LOAN ASSOCIATION, a corporation, and FIDELITY SERVICE CORPORATION, a corporation,

Appellants,

vs.

WILLIAMS CONSTRUCTION CO., a corporation, and A. J. BUMB, Receiver,

Appellees.

APPELLEES' BRIEF.

GOLDMAN, GOLDMAN & ARNOLD,
By LEONARD A. GOLDMAN,
408 South Spring Street,
Los Angeles, Calif. 90013,
Attorneys for Appellee A. J. Bumb, Receiver.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

Page

I.

Statement of Jurisdiction 1

II.

Statement of the Case 2

III.

Summary of Issues and Argument 5

IV.

Argument 6

1. The Referee's Findings of Fact and Conclusions of Law on Both Orders Appealed From Are Not Clearly Erroneous and Should Be Affirmed 6

2. The Referee Found Properly That There Was Equity in the Property Under Consideration in This Appeal 7

3. The Bankruptcy Court Has the Power to Sell Property Free and Clear of the Liens or Subject to Them 9

4. The Contract Between Parties Is Subject to the Bankruptcy Law and Such Law Is Written Into the Contracts of the Parties 12

5. The Bankruptcy Court May Change the Remedy Under a Contract If an Equally Adequate Remedy Is Available 13

V.

Conclusion 16

TABLE OF AUTHORITIES CITED

Cases | Page

Allebach v. Thomas, 16 F. 2d 853 at 855 (C/A 4th Cir. 1927) 13

Bernard Altman, In Re, 226 F. Supp. 201 (1963 U.S. D/Ct. S.D.N.Y.) 9

Continental Illinois National Bank v. R.I. RR, 294 U.S. 648, 79 L. Ed. 1110 (U.S.) 14

F. P. Newport Corp., In Re (C.D. Cal., 1954), 123 F. Supp. 95 at p. 98 11

Hoppe v. Rittenhouse (9th Cir. 1960), 279 F. 2d 3.. 7

Jersey Island Packing Co., 138 Fed. 625 (9th Court of Appeals), at p. 627 12

Jue v. Bass (9th Cir. 1962), 299 F. 2d 374, 377 7

Louisville Bank v. Radford (1934), 295 U.S. 555 at 584 9

Miller, In Re, 95 F. 2d 441 at p. 443 11

Olympic Finance Co. v. Thyret (9th Cir. 1964), 337 F. 2d 62 7

Redmond v. United Funds Management Corp. (C/A 8th 1944), 144 F. 2d 158 13

Tepper v. Chichester (9th Cir. 1961), 285 F. 2d 309, 312 7

United States National Bank v. Pamp, 83 F. 2d 503 12

Van Huffel v. Harkelrode, 284 U.S. 225, ... S. Ct. 115 (1931) 9

Wright v. Union Central Insurance Co., 304 U.S. 503, 82 L. Ed. 1490 (U.S. Supreme Court, 1938), at p. 515 14

Miscellaneous | Page
General Order of Bankruptcy No. 47 6

Statutes

Bankruptcy Act, Sec. 70(f) 9
United States Code Annotated, Title 11, Sec. 47 1
United States Code Annotated, Title 11, Sec. 67(c) 1
United States Code Annotated, Title 11, Sec. 110 9
United States Code Annotated, Title 28, Sec. 1334 1

Textbooks

4 Collier on Bankruptcy, Sec. 70.97(2), pp. 1895-1902 9
4a Collier on Bankruptcy, Sec. 70.97, p. 1133 9

No. 22366

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

METROPOLITAN SAVINGS AND LOAN ASSOCIATION, a corporation, and FIDELITY SERVICE CORPORATION, a corporation,

Appellants,

vs.

WILLIAMS CONSTRUCTION CO., a corporation, and A. J. BUMB, Receiver,

Appellees.

APPELLEES' BRIEF.

I.

STATEMENT OF JURISDICTION.

This is an appeal from a decision of the United States District Court for the Central District of California (hereinafter called "the Court below") on review, pursuant to 11 U.S.C.A. §67(c), of orders of a Referee in Bankruptcy. The Court below had jurisdiction pursuant to 28 U.S.C.A. §1334 which provides that

> "District Courts shall have original jurisdiction . . . of all matters and proceedings in bankruptcy."

Jurisdiction over the instant appeal is conferred upon this Court by 11 U.S.C.A. §47 which provides that Courts of Appeal

> "are invested with appellate jurisdiction from the several courts of bankruptcy in their respective

> jurisdiction in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise or reverse, both in matters of law and in matters of fact . . ."

The Appellees herein wish to have this Court affirm the decision of the Court below which affirms certain orders of the Referee in Bankruptcy.

II.
STATEMENT OF THE CASE.

Appellee, Williams Construction Co., a corporation, is a debtor in a proceeding in the Bankruptcy Court under Chapter XI of the Bankruptcy Act. Appellee A. J. Bumb is the duly appointed and qualified receiver of Williams Construction Co., in the Bankruptcy proceedings.

Williams Construction Co., is a land developer having acquired the tract in 1963 that is in question on this appeal. Williams subdivided the property into 129 lots, of which 20 have been sold. The remaining lots owned by Williams consist of 109 lots. The sales prices of the lots that have been sold range between the sum of $12,500.00 and $15,000.00.

Williams fully improved the lots in question. The lots overlook a fully developed golf course and are quality lots. They range in elevation from 590 feet to 720 feet. The lots are within a mile of the extension of the Pomona Freeway and within a mile and a half of a shopping center. All of the streets in the tract have been paved, the curbs and gutters put in, and the underground utilities installed. The area is zoned for single family residential use [R-I-8500].

The highest and best use of lots owned by Williams is for single family residence use which is consistent with the general development and zoning of the area. The size of the lots varies between 8,500 square feet and 14,400 square feet. The lots present an interesting variation of approach, shape, elevation, views, and probable development. At least nine of the lots previously owned and sold have been fully improved with residences. The tract is located in the unincorporated community of Walnut Valley in the Southeast portion ot the San Gabriel Valley in Los Angeles County and is south and adjacent to Fifth Avenue about 1500 feet west of Brea Canyon Cut Off. The exact tract number is 28140.

The property was appraised by the estate's appraiser, Sam Jonas, for the total sum of $1,362,500.00 on September 30, 1966 which works out to an average of $12,500.00 per lot [See R. T. p. 15, line 24]. The appellant's appraiser, Taylor Dark of Marshall and Stevens Company testified that the selling price of lots today would be $13,500.00 on an average [See R. T. p. 269, lines 2-18]. Dark also testified that the fair market value, if the lots were sold individually, would be $1,200,000.00 plus [See R. T. p. 359, lines 22-23]. The owner, Herald Williams, President of Williams Construction Co., testified that the property was higher in value than $12,500.00 per lot, to wit, $14,000.00 to $16,000.00 per lot [See R. T. p. 149, lines 3-4]. The Appellant had no other expert testify on value who qualified as such expert. The equity of the Appellees was the sum of $366,183.00.

The Referee stated the definition of fair market value acceptable to this proceeding when he said

> "(The definition by the United States Supreme Court is) the amount in cash that in all probability would be arrived at by fair negotiation between an owner willing to sell and a purchaser willing to buy given a reasonable time to negotiate." [R. T. p. 393, lines 2-9].

The Referee granted the restraining order by order filed on November 23, 1966. The Receiver and Debtor brought on an Application to Transfer Lien of the Appellants to the Proceeds which was heard on November 28, 1966, and an order was granted to the Receiver and the Debtor dated January 17, 1967. The Referee in granting the order transferring the lien to the proceeds stated

> "That (Metropolitan Savings) will receive the lion's share (of sales proceeds), but I am going to permit the Receiver in this case to keep a small amount of what is received from those individual sales merely to cover the administrative costs of these proceedings; possibly five per cent, certainly not more than ten per cent in any sale until there has been enough of this property sold to put your client in a position where the default has been cured." [See R. T. p. 14, lines 8-17 of November 28, 1966 hearing].

The two orders were consolidated for review and a Memorandum Opinion dated September 18, 1967, and Supplement to Memorandum dated September 22, 1967, were entered by the District Court Judge. These matters are here upon appeal.

III.

SUMMARY OF ISSUES AND ARGUMENT.

In connection with the two orders of the Referee which are being appealed from, there are the following issues:

One, Are the Referee's rulings clearly erroneous?
Two, Is there an equity in the property in question?
Three, Does the Bankruptcy Court have the power to sell the property free and clear of the Appellant's lien?

Four, Does the Court have the right to substitute for the remedy of foreclosure the remedy of selling the property on a lot by lot basis?

In connection with these four issues, this Appellee summarizes the argument as follows:

One, The Referee's findings and rulings thereon are not clearly erroneous and should be affirmed upon this appeal. The record clearly shows that the findings of the Referee and the orders thereon have sufficient facts in the record to back-up said orders.

Two, The Referee's findings of equity in the subject property should be affirmed upon review. The record also clearly shows that there is an equity in this property for the benefit of this debtor and the Appellee. There is no evidence to the contrary to show that the equity of $360,000.00 is any less.

Three, The Bankruptcy Court does have the power to sell the subject property free and clear of liens of the appellants, and should exercise it here. The Bankruptcy Court is given the statutory authority to sell real property and derived from said statutory authority is the power to sell free and clear of liens. Such power

should be exercised when there is a substantial equity in the property.

Four, The contract between the Appellant and the Appellee Williams is subject to the Bankruptcy Act and such law is written into the contracts between the parties.

Five, The Bankruptcy Court has the right to substitute an equitable remedy of selling the subject property on a lot by lot basis in place of the remedy of foreclosure. The Court should be authorized to sell the property on a lot by lot basis where it properly finds as here, that there is a substantial equity and that a sale on a lot by lot basis is feasible. The Court should not authorize the foreclosure proceeding as a remedy where there is such a clear showing of such facts.

IV.

ARGUMENT.

1. The Referee's Findings of Fact and Conclusions of Law on Both Orders Appealed From Are Not Clearly Erroneous and Should Be Affirmed.

General Order in Bankruptcy No. 47 states that

> "unless otherwise directed in the order of reference the report of a Referee or a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous."

While it is true that the findings of a Referee are not necessarily conclusive, it appears to be well established that the Referee's findings should not be disturbed unless there is overwhelming evidence that the Referee was

mistaken and that the mistake would lead to a miscarriage of justice.

The Court of Appeals for the Ninth Circuit has stated that even in the absence of any need to judge the credibility of witnesses before the Referee, the reviewing court should exercise some degree of judicial restraint for the expertise of the Referee in Bankruptcy.

See:

Olympic Finance Co. v. Thyret (9th Cir. 1964), 337 F. 2d 62;

Jue v. Bass (9th Cir. 1962), 299 F. 2d 374, 377;

Tepper v. Chichester (9th Cir. 1961), 285 F. 2d 309, 312;

Hoppe v. Rittenhouse (9th Cir. 1960), 279 F. 2d 3.

This Court of Appeals should, on the basis of the findings of fact and the record herein affirm the orders of the Court because there is no overwhelming evidence that the Referee was mistaken and because this Appellate Court should exercise some degree of judicial restraint in regard for the expertise of the Referee in Bankruptcy.

2. The Referee Found Properly That There Was Equity in the Property Under Consideration in This Appeal.

The property was appraised by the Appellee's appraiser for the total sum of $1,362,500.00 which was an average of $12,500.00 per lot [See R. T. p. 15, line 24]. The Appellants' appraiser, Taylor Dark of Marshall and

Stevens Company testified that the selling price of lots would be $13,500.00 on an average [See R. T. p. 269, lines 2-18]. Dark also testified that the fair market value of the lots if sold individually would be $1,200,-000.00 plus [See R. T. p. 359, lines 22-23]. The Appellant had no other qualified expert testimony concerning the value of the property on an individual lot basis.

The definition of fair market value acceptable to this proceeding was correctly stated by the Referee when he said:

> "The amount in cash that in all probability would be arrived at by fair negotiation between an owner willing to sell and a purchaser willing to buy, given a reasonable time to negotiate." [See R. T. p. 393, lines 2-9].

The Appellants incorrectly seek to add to the correct definition of fair market value another element to wit:

> "The fair market value of the property if purchased as a package by one person who would sell these lots at a later date at a profit." [See R. T. p. 323, lines 17-21].

The burden upon the Appellee to prove that there was an equity in this property was proved both by the Appellee's witnesses and the Appellant's expert witness, Taylor Dark.

There is no requirement that the Appellee produce evidence that the lots must be sold as a tract and would therefore produce a sum in excess of the appellant's lien.

3. The Bankruptcy Court Has the Power to Sell Property Free and Clear of the Liens or Subject to Them.

The power of the Bankruptcy Court to sell Property is set out in Section 70(f) (11 U.S.C. §110), of the Bankruptcy Act which says "real and personal property shall, when practicable, be sold subject to the approval of the Court".

The power to sell property free and clear has been derived from the said action. See *Collier on Bankruptcy,* Volume 4a, Page 1133, Section 70.97. See also *In the Matter of Bernard Altman,* 226 F. Supp. 201-1963 U.S.D./Ct. S.D.N.Y.

Also see:

Van Huffel v. Harkelrode, 284 U.S. 225, ... S. Ct. 115, 1931.

The Bankruptcy Courts have the power to sell free and clear of encumbrances but (only) where it appears that the amount of the encumbrances do not exceed the value of the property.

Louisville Bank v. Radford (1934), 295 U.S. 555 at 584.

See also:

4 Collier on Bankruptcy, Section 70.97 (2), pages 1895 to 1902 *et seq.*

It would be inequitable to allow the Appellant to rely on its argument that the property should be sold in bulk, when the property should be sold on a basis of lot by lot, and especially where as here there is a sub-

stantial equity of about $350,000.00 to protect for the creditors.

The cases and the statute have realized that where there is an equity in the property of a major amount, that the Courts should under the inherent equity rule of the Courts allow a sale free and clear of the lien of the appellants.

The findings show that the property is capable of development on an individual lot basis and there is no evidence to show that it is better handled by a sale to one person interested in a tract. There is no evidence in the record to show that the security will progressively lose its character as a tract (see page 22 of Appellant's brief), nor does the record show that the lien of the appellant is going to be transferred to another security.

The argument that each lot cannot be sold because it is subject to the full encumbrance is an argument which eliminates all possibilities of allowing the bankruptcy court to protect all parties including the rights of the secured creditors, the debtor, the receiver and the creditors. Ample protection is given to the Appellant by reason of the protection outlined by the Referee in this record, which is as follows:

> "As I told you before, you will receive the lion's share, but I am going to permit the receiver in this case to keep a small amount of what is received from those individual sales merely to cover the administrative costs of this proceeding; pos-

> sibly 5%; certainly not more than 10%, in any sale until there has been enough of this property sold to put your client in a position where the default has been cured at least." [See. R. T. p. 14, lines 8-17, hearing of November 28, 1966].

The discretionary power in the Bankruptcy Court should not be disturbed unless it appears to have been improvidently exercised, especially where the Referee represented, as he did in this case, that he believes it to be in the best interest of the estate to order a sale free of encumbrance. See *In re Miller,* 95 F. 2d 441 at page 443.

As indicated by Judge Leon Yankwich in *In re F. P. Newport Corp.* (C.D. Cal. 1954), 123 F. Supp. 95, page 98:

> ". . . and we know of no rule or practice that would warrant the court in setting aside the order of the Referee where he uses his best judgment both as to the method of sale and as to the sufficiency of the price at which the sale was made."

As the Referee pointed out in Findings of Fact 11:

> "that it is in the best interest of the general creditors that said lots be sold separately rather than on a wholesale basis."

The Referee further said in Findings of Fact 12:

> "that a sale of said lots free and clear of the lien of the Respondent Metropolitan Savings and Loan Association will in no way impair any substantive right of said respondent." [C. T. pp. 68, 69 and 70].

4. The Contract Between Parties Is Subject to the Bankruptcy Law and Such Law Is Written Into the Contracts of the Parties.

See *Jersey Island Packing Co.,* 138 Fed. 625, 9th Court of Appeals at 627,

> "It is true that the Bankruptcy Act provides that liens such as the lienholders had under the trust deeds in this case shall not be affected by bankruptcy, but that is far from saying that such lienholders may, after the commencement of proceedings in bankruptcy against the debtor, proceed to enforce their liens or contracts in the manner prescribed in the instruments which create them; and this is true whether such lien is an ordinary mortgage, or a deed of trust with provision for a street foreclosure by notice and sale. The provision of the bankruptcy act, that such a lien shall not be affected by the bankruptcy proceedings has reference only to the validity of the lienholders contract. It does not have reference to his remedy to enforce his right. The remedy may be altered without impairing the obligation of his contract, so long as an equally efficient and adequate remedy is substituted."
>
> "Every one who takes a deed of trust intended as a mortgage *takes it subject to the contingency that proceedings in bankruptcy against his mortgagor may deprive him of the specific remedy which is provided for in his contract.* (Emphasis added).

Citing the *Jersey Island Packing Co.,* language is *United States National Bank v. Pamp,* 83 F. 2d at 503.

5. The Bankruptcy Court May Change the Remedy Under a Contract if an Equally Adequate Remedy Is Available.

A substituted remedy should be allowed where the Court finds that the best way to sell property is on an individual lot by lot basis. The Referee in the instant case found this as a finding of fact and there was no evidence to the contrary presented by the Appellant. Even the expert witness for the Appellant testified as to the greater value of the property if it was sold on a lot by lot basis.

Although the bankruptcy act expressly preserves the rights of secured creditors, the jurisdiction and method of determining such rights is procedural. The Court of Bankruptcy has adequate equity powers to adjudicate all liens and the method of their liquidation. See *Redmond v. United Funds Management Corp.* (C/A-8th, 1944), 144 F. 2d 158.

Also see *Allebach v. Thomas,* 16 F. 2d 853 at 855, Court of Appeals, 4th Circuit 1927:

> "The theory of the Appellants and Petitioners for review is that they have been deprived by the action of the Court of some contractual right in respect to their debts, and the security taken for payment of the same. This, however, is an entire misconception of the effect of the Bankruptcy Law, which in plain terms provides that the bankruptcy proceedings shall not affect the validity of the lien; *but it nowhere says that this fact shall in any manner affect the remedy to enforce the lienor's rights. The remedy may be altered, without impairing the obligations of the contract, so long as an equally adequate remedy is afforded.*" (Emphasis added).

See also at page 855:

> "Just to whom shall be delegated the power to sell the property depends upon many considerations. Preferentially, as between the Bankrupt's Trustee and the Trustee (under) the deeds of trust . . . where an equity is believed to exist, the choice would be with the bankrupt's trustee, as he is assumed to be impartial, and representative of a bankrupt, lienors, and the creditors, alike; whereas, the trustees in deeds of trust are alone interested in the protection of their beneficiaries . . . this entire subject is within the discretion of the bankruptcy court . . . and [should use the one method] best suited to yield . . . the best results."

The case of *Wright v. Union Central Insurance Co.,* 304 U.S. 503, 82 L. Ed. 1490, U.S. Supreme Court, 1938 at page 515, stated:

> "The mortgage contract was made subject to constitutional power in Congress to legislate on the subject of bankruptcy. Implied by this was written into the contract between petitioner and respondent."

and at page 517,

> "Bankruptcy proceedings constantly modify and affect the property rights established by state law."

In the case of *Continental Illinois National Bank v. R.I. RR,* 294 U.S. 648, 79 L. Ed. 1110, U.S. Supreme Court allowed the suspension of the enforcement of lien in reorganization cases, reviewing all of the cases granting such relief.

The remedies substituted by the Referee for Appellants remedy of foreclosure was found to be adequate and efficient. The Referee's decision should not be disturbed upon appeal, as the Referee found that there is a substantial equity in this property. The Bankruptcy Court having the power to order a sale free and clear of liens, an interference with such authority by the argument of the Appellant that the property should be sold in bulk would produce an inequitable result.

There is no evidence before the Court in the record that the sale free and clear of the Appellant's lien will produce anything other than a full payment to the Appellants. The Referee desired the sale to produce proceeds which would benefit the Appellant. The Appellants argument that the property would progressively lose its character as a tract, if true, and if a part of this record, could be used as an argument on behalf of this Appellee to the effect that as property is sold the Appellant's interest in the balance of the tract would be increased. The Appellee then would be in the position ascribed to the Appellants by the opening brief of the Appellants.

The argument raised by the Appellant concerning the alleged injury to the Appellant is not in this record. However, assuming that it is true and assuming it to be in this record, a sale free and clear on a lot by lot basis will improve the position of the Appellant and eliminate any alleged damages.

V.
CONCLUSION.

The Court having statutory power to sell property and deriving the power to sell free and clear, from such authority, the power should be authorized when there is a clear, uncontroverted finding of a substantial equity. The Bankruptcy Court should be allowed to substitute the remedy of sale of the lots in the subject property on an individual basis free and clear of the Appellant's lien subject to the payment to the appellant.

Respectfully submitted,

Goldman, Goldman & Arnold,
By Leonard A. Goldman,
Attorneys for Appellee
A. J. Bumb, Receiver.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

LEONARD A. GOLDMAN

No. 22366

JUN 19 1968

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

METROPOLITAN SAVINGS AND LOAN ASSOCIATION, a corporation, and FIDELITY SERVICE CORPORATION, a corporation,

Appellants,

vs.

WILLIAMS CONSTRUCTION CO., a corporation, and A. J. BUMB, Receiver,

Appellees.

APPELLANTS' REPLY BRIEF.

FILED

JUN 14 1968

WM. B. LUCK, CLERK

MCKENNA & FITTING,
DANIEL N. BELIN,
AARON M. PECK,
427 West Fifth Street,
Los Angeles, Calif. 90013,
Attorneys for Appellants Metropolitan Savings and Loan Association and Fidelity Savings Corporation.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

page

I.

Preliminary Statement 1

II.

Under California Law, Williams Has No Right to a Partial Reconveyance From Metropolitan's Deed of Trust 2

III.

The Powers of the Bankruptcy Court to Order the Sale of Encumbered Property Free and Clear of Liens and to Determine Whether the Sale of the Bankrupt's Property Shall Be in Bulk or in Parcels Are Powers to Determine the Procedure by Which the Estate Shall Be Liquidated; Neither Separately nor Together Do They Permit the Bankruptcy Court to Abrogate the Substantive Legal Rights of Secured Creditors 8

IV.

The Orders of the Bankruptcy Court Impair Metropolitan's Substantive Legal Rights 10

V.

There Is No Realizable Equity in the Property 18

VI.

The Orders of the Bankruptcy Court Are Illegal Because Their Implementation Will Cause Metropolitan Substantial Injury 18

TABLE OF AUTHORITIES CITED

Cases | Page

Beardsley, In Re, 38 F. Supp. 799 16

Bradbury v. Thomas, 135 Cal. App. 435 6

Chafee County Fluorspar Corporation v. Athan, 169 F. 2d 448 9

Conley v. Poway Land & Inv. Co., 232 Cal. App. 2d 22 5

Sacramento S.F.L. Co. v. Whaley, 50 Cal. App. 125 4

Securities and Exchange Commission v. United States Realty and Improvement Company, 310 U.S. 434 9

United States v. National Furniture Company, 348 F. 2d 390 9

Statute

Bankruptcy Act, Sec. 307(1) 9

Textbook

IX Collier on Bankruptcy, Sec. 7.05(4) 9

No. 22366

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

METROPOLITAN SAVINGS AND LOAN ASSOCIATION, a corporation, and FIDELITY SERVICE CORPORATION, a corporation,

Appellants,

vs.

WILLIAMS CONSTRUCTION CO., a corporation, and A. J. BUMB, Receiver,

Appellees.

APPELLANTS' REPLY BRIEF.

I.

Preliminary Statement.

Appellants Metropolitan Savings and Loan Association ("Metropolitan") and Fidelity Service Corporation ("Fidelity") submit this brief in response to the Answering Brief of Williams Construction Co. ("Williams").[1] Where the answer to a contention advanced by Williams embraces material set forth in Appellants' Opening Brief, Appellants will cite to and summarize such material herein rather than setting it forth *in extenso.*

---

[1]There is another appellee in the within appeal, A. J. Bumb, the receiver of the subject property; but no brief has been filed on his behalf.

II.

Under California Law, Williams Has No Right to a Partial Reconveyance From Metropolitan's Deed of Trust.

In their Opening Brief, Appellants pointed out that under California law a trustor has no right to the partial reconveyance of property subject to a deed of trust in the absence of a provision in the deed of trust authorizing such a reconveyance; and that when the deed of trust does provide for a partial reconveyance, a trustor, in order to be entitled to such partial reconveyance, must comply with the conditions prescribed therefor in that deed of trust (Appellants' Op. Br. pp. 13-15).

In the instant case, the deed of trust expressly provided that Williams was entitled to the release of individual lots from Metropolitan's lien only if two conditions were satisfied: (1) the loan which Metropolitan's deed of trust secured was not mature; and (2) the loan was not in default. At the time of the entry of the order of the bankruptcy court authorizing partial reconveyances from Metropolitan's encumbrance, the loan was both mature and in default. Because the conditions were not satisfied, Williams had no right to a partial reconveyance.

Williams does not dispute Appellants' statement of the law, but makes two contentions in an effort to avoid its effect:

1. That, regardless of any right of Williams to secure the release of individual lots from the deed of trust to which the bankruptcy court may have succeeded, the instant case "involves the

power of the Bankruptcy Court to order a judicial sale of encumbered property, free of the encumbrance, and to determine the manner of sale appropriate in the circumstances" (Answering Brief of Appellee Williams Construction Company, p. 23). The argument is answered by Appellants in Sections III and IV, *infra.*

2. That the California courts have decided cases involving the right to the partial release of security from a lien on an "ad hoc" basis, and because this is a bankruptcy situation the California courts would, if given the opportunity, override the settled rule that the right to a partial reconveyance of security is governed by the terms of the security instrument. To quote Williams, "In a case in which the rights of the secured creditors can be protected,[2] and the rights of third parties are at issue,[3] there is considerable

---

[2]This is a purely hypothetical assumption—the rights of Metropolitan in this case have manifestly not been adequately protected (See Sections IV and VI, *infra*).

[3]Throughout its brief, Williams seeks to picture itself as the solicitious protector of (presumably small and defenseless) unsecured creditors, while portraying Metropolitan as the corporate counterpart of the nineteenth century stage villain. It contends that this Court should dispose of the present appeal favorably to Williams in the interests of these anonymous but omnipresent third parties "who have created the value that exists in the property by cutting lots out of raw acreage, installing the curbs, paving the streets, putting in the underground utilities, and carrying out all of the other activities requisite to manufacturing lots" and "who will otherwise lose everything" (Answering Brief of Appellee Williams Construction Company, p. 12).

The argument is faulty for several reasons. First, the facts do not support it. There is no evidence in the record of which Metropolitan is aware to indicate either the source of the claims of these unsecured creditors of that a ruling in favor of Metropolitan would cause them to "lose everything." Further, and more fundamentally, the function of the bankruptcy court is to protect all interests in accordance with law and not to rule in accordance with a desire to equalize wealth.

> reason to believe the California courts would give effect to a release clause [notwithstanding the fact that the conditions for release contained in the release clause are unsatisfied]" (Answering Brief of Appellee Williams Construction Company, p. 26).

Insofar as the second argument is concerned, what Williams bases its conclusion on, except wishful thinking, is not clear; certainly the authorities cited by Williams do not support it.

The first case discussed by Williams in this connection is *Sacramento S.F.L. Co. v. Whaley,* 50 Cal. App. 125 (1920), in which the court held that the trustors were entitled to the reconveyance of a portion of their security, even though the loan was in default.

The difficulty with the *Whaley* case for Williams' purposes—a difficulty recognized by Williams[4]—is that the reconveyance was not in contravention of the terms of the deed of trust; rather, *it was expressly authorized by it.* The deed of trust did not limit the exercise of this right to the period that the loan was not in default, but rather, provided that:

> "Said mortgagee shall release any 10-acre lot or more from the lien of this mortgage upon the payment by the said mortgagee of One Hundred Twenty-five Dollars ($125.00) per acre for each acre so to be released." (125 Cal. App. 126).

Indeed, the issue before the court was whether the *fact of default itself* would vitiate the right to a partial release of security *authorized by the terms of the deed of trust.* There is nothing whatever in the case which suggests that contractual limitations upon the exercise

[4]"In this case [Whaley] the parties did not attempt to place any limitation on the operation of a release clause." (Answering Brief of Appellee Williams Construction Company, p. 24).

of the right to a partial reconveyance would not be enforced as stringently in a bankruptcy situation as in any other.

Another case relied upon by respondent is *Conley v. Poway Land & Inv. Co.*, 232 Cal. App. 2d 22 (1965), cited by Appellants on page 14 of their Opening Brief.

Williams' treatment of the *Conley* case is highly misleading because it indicates that the case upheld the right of a trustor to the release of property subject to a deed of trust in contravention of the terms of the applicable release provision. In fact the contrary is true.

The governing contractual provision, of which Williams conveniently ignores all but the first phrase, is as follows:

> " 'So long as the trustor be not in default concerning any of the covenants contained herein or with respect to the payments due on the promissory note secured hereby, a partial reconveyance may be had and will be given from the lien or charge hereof of any portion of the property hereinbefore described upon payment of an amount to apply on the principal of said note, based on a rate of $1,149.00 for each acre. . . . Trustor may at any time make a payment to Trustee for the purpose of securing a partial reconveyance in which event Trustee shall, without the necessity of any approval by Beneficiary or Beneficiaries or the securing of any other documents, make a partial reconveyance of such portion or portions of the property hereinbefore described as Trustor may request provided only so much acreage shall be reconveyed as Trustor has paid for at the rate mentioned in this paragraph . . .' " (232 Cal. App. 2d 25).

The trustor made the required payment before default but did not request a reconveyance until after a default had occurred. Hence, the question before the court was whether the occurrence of the default would have the effect of divesting the trustor of a right to a partial reconveyance which accrued upon the making of the required payment. The court held:

> "We interpret *the language of the deed of trust to mean* that no right to reconveyance would accrue while the principal was in default but that it has no application to such rights accrued before the default." (232 Cal. App. 2d 27; emphasis added).

In other words, all the court was doing was giving effect to the terms and conditions of the security instrument as it construed them. There is nothing whatever in the opinion to suggest a disposition on the part of the California courts to subvert the rule that the question of the right to the partial release of security from an encumbrance is governed by the terms of the encumbrance.[5]

Finally, Williams' treatment of *Bradbury v. Thomas,* 135 Cal. App. 435 (1933) can only be regarded as an admission of the weakness of his position. Williams quotes a passage from the opinion and characterizes that passage as indicating that the trial court might have reached a different conclusion had "equitable con-

---

[5]Furthermore, Appellants wish to emphasize, as they did in their Appellants' Opening Brief, that this is not a situation in which a secured creditor is attempting to exploit a mere technical noncompliance with conditions; the noncompliance with the conditions for partial reconveyance is gross (See Appellants' Op. Br. p. 15).

siderations" been before it (Answering Brief of Appellee Williams Construction Company, p. 24).

Appellants submit that no such inference can properly be drawn from the passage and that, in fact, the court was saying that in the absence of a contractual provision authorizing it, there is no way for a trustor to obtain the partial release of security from a lien.

In any event, this is the passage in question. The court can reach its own conclusion as to what it means:

> "It is obvious that the appellants relied solely on the release clause of the mortgage. This must be so, for it is the only provision which furnishes any force to their claim that they are entitled to have their title to 15 lots quieted against respondent's mortgage lien. Certainly, if the mortgage had contained no release provision there could have been no pretense on their part that they were entitled to have any of the mortgaged premises declared free from the mortgage lien." (135 Cal. App. 2d 442).[6]

---

[6]How Williams can quote the statement from the *Bradbury* case "if the mortgage had contained no release provision there could have been no pretense on their [the mortgagors'] part that they were entitled to have any of the mortgaged premises declared free from the mortgage lien" and then argue that had there been no release provision in the Williams' deed of trust "it is rather clear that the court could have ordered a sale in parcels or lots" (Answering Brief of Appellee Williams Construction Company, p. 25) is frankly incomprehensible to Appellants. The *Bradbury* case makes it emphatically clear that it is only when there *is* a release provision that the mortgagor is entitled to the release of a portion of his security.

III.

The Powers of the Bankruptcy Court to Order the Sale of Encumbered Property Free and Clear of Liens and to Determine Whether the Sale of the Bankrupt's Property Shall Be in Bulk or in Parcels Are Powers to Determine the Procedure by Which the Estate Shall Be Liquidated; Neither Separately nor Together Do They Permit the Bankruptcy Court to Abrogate the Substantive Legal Rights of Secured Creditors.

Williams' principal defense of the action of Referee Kinnison in ordering the sale of individual lots free and clear of Metropolitan's deed of trust is that it involved the exercise of power conferred by Federal law and independent of any power acquired through succession to the rights of the bankrupt (or, in this case, debtor). Reduced to its essentials, what Williams is saying is that the powers of the bankruptcy court include the following:

1. The power to sell encumbered property, free and clear of liens;
2. The power to determine whether the assets of the bankrupt estate shall be sold in bulk or in parcels.

Ergo, in this case the bankruptcy court must have the power to order the sale of the lots in question individually, free and clear of Metropolitan's lien.

But, as Appellants pointed out in Appellants' Opening Brief, pages 10-11, 19-25, the power of the bankruptcy court to order the sale of property free of liens is the power to prescribe the procedure by which a secured creditor realizes upon his security, and to substitute another remedy *which is equally adequate and efficient*

for that of which the secured creditor would otherwise avail itself. Similarly, the power of the bankruptcy court to determine whether the property is sold in bulk or in parcels is merely the power to determine the procedure by which the estate of the bankrupt (or debtor) is liquidated. Neither of these powers invests the bankruptcy court with the power to impair *the substantive legal rights* of secured creditors; and the release of individual lots from Metropolitan's lien would necessarily involve such impairment.

The orders of the bankruptcy court were issued in a proceeding for an arrangement under Chapter XI of the Bankruptcy Act. The Bankruptcy Act defines an arrangement in §306(1) as "any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his *unsecured debts* . . ." (emphasis added). As stated in Collier on Bankruptcy, Volume IX, §7.05[4], "No provision of the [Bankruptcy] Act permits an arrangement proposed under Chapter XI to deal with the rights of secured creditors." In *Chafee County Fluorspar Corporation v. Athan*, 169 F. 2d 448 (10 Cir. 1948) the Court stated, "Since . . . only the rights of unsecured creditors of the debtor may be arranged, [citation], the [bankruptcy] court should not exercise its injunctive powers in a manner to alter the rights of the secured creditors of the debtor." (169 F. 2d 450). See *Securities and Exchange Commission v. United States Realty and Improvement Company,* 310 U.S. 434, 452-453 (1940); *United States v. National Furniture Company,* 348 F. 2d 390, 392 (1965). As set forth in Section IV, *infra,* the orders of the bankruptcy court herein clearly alter the rights of Metropolitan, a secured creditor.

IV.

The Orders of the Bankruptcy Court Impair Metropolitan's Substantive Legal Rights.

The reason that the orders in question do not provide Metropolitan with a remedy for realizing upon its security which is as adequate and efficient as that of which it could otherwise avail itself and impair Metropolitan's substantive legal rights are set forth in considerable detail in Appellants' Opening Brief, pp. 10-11, 22-25. Basically, the reasons are as follows:

1. Under the terms of its deed of trust, Metropolitan can, by causing a foreclosure under the power of sale, effect an immediate liquidation of its claim. Under the orders in question, the liquidation will be drawn out over a number of years, during which Metropolitan will be burdened with a frozen asset. (For a discussion of the particularly adverse consequences of such an asset upon a saving and loan association, see Appellants' Op. Br. pp. 28-30).

2. The security for Metropolitan's loan consists at the present time of a tract of substantially contiguous lots subject to development on an integral basis. The effect of the order that the lots are to be sold on an individual basis free and clear of Metropolitan's lien would be to transform the character of that security into an aggregation of non-contiguous lots not subject to such development.

3. Metropolitan made a loan to Williams of eight months' duration. The effect of the orders in question is to rewrite the loan into a loan for the duration of the time required to sell off the lots, probably a period of many years.[7]

---

[7]The foregoing contrasts sharply with Williams' narrow, incomplete and misleading characterization of Appellants' position (Answering Brief of Appellee Williams Construction Company, p. 17).

Since Williams' answer to the foregoing consists in large measure of a recital of the findings of Referee Kinnison and argument based upon those findings, Appellants wish to emphasize that the instant appeal is not predicated upon the contention that the findings of fact entered by the bankruptcy court are erroneous.[8] The dispute between Appellants and Williams is not as to the facts but rather as to *the legal effect of facts which, in their material respects, are undisputed.* (While Williams argues that there is no evidence in the record to support certain facts allegedly relied upon by Appellants, as demonstrated *infra* Williams is wrong for one of two reasons: either there *is* such evidence, or the fact is not one upon which Appellants relied). Hence, rules which limit the role of an appellate court with respect to questions of fact resolved by the trier of fact have no application here.

Williams asserts that the order for the sale of the lots "was fully consistent with the intentions and the expectations of the parties at the time they entered the agreement." As evidence of the intent it cites the character of the lots and that under the terms of Metro-

---

[8]Obviously Appellants do not accept findings such as "there is a substantial equity of the debtor in the said property" [C. T. p. 69, lines 31-32] or that "a sale of said lots free and clear of the lien of the respondent Metropolitan Savings and Loan Association will in no way impair any substantive right of said respondent" [C. T. p. 70, lines 10-13]. These, however, are not really findings of fact but, rather, conclusions as to the legal effect of facts which are the subject of other findings. While Appellants do feel that the findings entered by the bankruptcy court are defective for failure to find on the material issues, it is clear from the record that if such findings had been made they would have been in Appellants' favor. For example, there is no finding on the amount which the lots could be expected to bring if sold as a tract, and Metropolitan objected to the absence of such a finding [C. T. p. 63, lines 15-26]. The evidence that a sale on this basis would not yield a surplus over and above Metropolitan's lien is, however, undisputed [R. T. p. 310, lines 5-10].

politan's deed of trust, Metropolitan "valued each lot separately."[9] (Answering Brief of Appellee Williams Construction Company, p. 14).

Although the deed of trust does provide for the release of individual lots, the parties contemplated that such release would be permitted only in a "going" situation in which regular payments were being made on the indebtedness and the property was being sold off on a normal basis. This has little relationship to the contemplation of the parties in a salvage situation. Indeed, the limitations upon Williams' right to secure the release of individual lots—including a fixed date (the maturity date of the loan) after which no further release would be permitted, and a requirement that the loan not be in default—clearly indicate a desire and intent on the part of Williams *and* Metropolitan to preserve the tract character of the land in the event the project ran into difficulty.

Furthermore, the basis upon which the lots were to be sold relates to only one aspect of Metropolitan's intent. Did Metropolitan, which made a loan that by its terms was limited to one year, *intend* to make a loan that was to last for the duration of the sales program contemplated by the order for the sale of the lots—an indefinite period, but certainly one many times the original term of the loan? Williams' contention that the order for the disposition of the lots "was fully consistent with the intentions and the expectations of the parties" is just not true.

Williams' attempt to equate the tract to "two lots located in separate parts of the state" is so plainly con-

---

[9]This is incorrect. The deed of trust did not purport to ascribe a value to the lots but only to prescribe the amount by which the principal indebtedness of Williams to Metropolitan would have to be reduced in order to secure the release of a given lot from Metropolitan's encumbrance.

trary to the facts as to be ludicrous (Answering Brief of Appellee Williams Construction Company, p. 14). The two pages of Williams' brief, pages 15 and 16, devoted to quoting findings of Referee Kinnison relating to such matters as the lot numbers, zoning, proximity to streets, elevation, topography, curbs, gutters and utilities cannot obscure the simple fact that at present the property consists of a tract of 109 substantially contiguous lots susceptible to development on an integral basis. It will become progressively less susceptible to such development as lots are sold off until, at some point, integral development will be precluded (See Appellants' Op. Br. pp. 22-23, 31-32). Williams claim that this is not a situation in which "a filling station could be constructed in the middle of what might otherwise be a golf course", while true, merely means that the order of sale could be even more outrageous if circumstances were different; that does not make it acceptable under existing circumstances.[10]

Williams' assertion that the factual basis for Metropolitan's claim that its substantive rights will be impaired by the order of sale consists "almost exclusively of speculation" (Answering Brief of Appellee Williams Construction Company, p. 17) reflects both ig-

[10]Williams' suggestion that Metropolitan's opposition to the orders in question is motivated by a desire to secure for itself the surplus over Metropolitan's indebtedness which such a lot by lot sale of the tract would allegedly produce (Answering Brief of Appellee Williams Construction Company, pp. 11-12) is presumptuous and totally without evidentiary support. Indeed, there is evidence directly to the contrary: when Metropolitan felt that there was a likelihood that it would acquire the lots through purchase at foreclosure, it expressed a clear desire to resell the entire tract as a tract [See R. T. p. 370, line 2, to p. 371, line 9; R. T. p. 411, lines 3-16; R. T. p. 421, lines 3-9]. Furthermore, the foreclosure of Metropolitan's deed of trust would occur at a public sale. If this alleged "third of a million dollar profit" is such a lure to Metropolitan as Williams purports to believe, surely it would attract others also; and a third party might well wind up buying the tract.

norance of the content of the record on appeal and a misconception of Metropolitan's position.

The statement that "[t]here is no evidence that the time of sale [of the lots on an individual basis] would necessarily be 'three, four or five years'" (*ibid.*) is flatly untrue. Taylor Dark, an expert witness, testified based upon detailed land development and demographic studies that approximately four years would be required to sell off the lots [R. T. p. 279, line 8, to p. 286, line 9].

If that were not enough, we have Williams' own experience. Harold E. Williams, the president of Williams Construction Company, testified that for a protracted period prior to the commencement of Chapter XI proceedings, he made intensive efforts to sell the lots:

> "Q. [by Metropolitan's counsel] During what other times prior to January 27, 1966 did you make constant efforts to dispose of the 109 lots or any of them?
>
> A. [by Williams] *All the time that I had anyone to talk about it*" [R. T. p. 168, lines 15-19; emphasis added].

Several brokers were employed, one of whom had an exclusive listing for approximately six months and the other an exclusive listing for approximately three months. There is no evidence that these brokers were anything less than diligent in their sales efforts, and by Williams' own admission one of the brokers, Agnes Kerr, "ran advertising and made the normal sales efforts" and "impressed [him, Williams] with her approach to the area" [R. T. p. 169, lines 1-12; R. T. p. 170, lines 1-15; R. T. p. 171, lines 4-25].

What was the measure of Williams' success? A quotation from the Answering Brief of Appellee Williams Construction Company, page 16, is a complete answer to that question:

> "Eight of the lots of the original tract were sold in the first six months of 1965 . . ."

(While twelve other lots were sold at various times during 1965, most of these were not sales at price levels which would yield a surplus over and above Metropolitan's encumbrance; one of the lots was given in satisfaction of an indebtedness and others were sold at what Harold Williams described as "absolute cost" [R. T. p. 207, line 20, to p. 208, line 3; R. T. p. 171, line 26, to p. 177, line 17].

In other word, Williams was able to sell an average of one and one-third lots per month. There is nothing whatever in the record before this court to suggest that a receiver in bankruptcy would be any more successful than Williams, whose inability to sell the lots was what evidently drove it to recourse to Chapter XI proceedings. Yet at the sales rate set by Williams' own experience, *approximately seven years would be required to sell off the entire tract.*

Williams is correct in its assertion that "[t]here is no evidence to indicate that the value of the unsold lots will decrease as more lots are sold" (*ibid.*). But Metropolitan never claimed that such a decrease in value would take place. Williams is glibly answering an argument that Metropolitan never made.[11]

---

[11]What Metropolitan did say is that probably the lots remaining after an unsuccessful sales program would very likely be the least desirable and least saleable in the tract (Appellants' Opening Brief, p. 32). Lots are obviously not fungible; each is unique and possesses attributes which affect its desirability and, hence, saleability. Undoubtedly factors such as price and individual pref-

(This footnote is continued on the next page)

The thrust of Metropolitan's position with regard to its situation in the event the receiver should give up the sales program in the middle is not that there will be insufficient security for Metropolitan's loan—though this is clearly a risk—but, rather, that Metropolitan will be left with a different security than that for which it contracted (See Appellants' Op. Br. pp. 22-23, 31-32.)[12]

Finally, Williams considers the "potential time delay", as Williams euphemistically describes it, in liquidating Williams' indebtedness to Metropolitan which the orders in question entail. It complacently notes that "there is a certain delay inherent in any extension of secured credit to a debtor who may ultimately be compelled to resort to the assistance of the bankruptcy law" and "the concept of fair market value necessarily implies a reasonable time in which to make the sale" (Answering Brief of Appellee Williams Construction Company, p. 18).

What Williams apparently does not comprehend, however, is that the source of "that certain delay" experienced when a debtor has recourse to bankruptcy proceedings is the power of the bankruptcy court to restrain secured creditors from foreclosing their security

---

erence are of some significance, but anyone who has ever been to a department store sale on the second day knows that the "picking over" process is an ever present phenomenon of the commerical world, as applicable to lots as to lingerie.

[12]While "[t]here is no evidence to indicate that all of the lots *cannot* be sold on a lot by lot basis" (Answering Brief of Appellee Williams Construction Company, p. 17; emphasis added), Metropolitan has no assurance that they *can* be sold, at least at the price levels necessary to pay off Metropolitan in full. *In Re Beardsley,* 38 F. Supp. 799, 803 (D.C. Md. 1941). (See Appellants' Op. Br. p. 32).

so as to preserve the *status quo* and prevent interference with its jurisdiction. The power does not permit the bankruptcy court to abridge the *substantive* legal rights of a secured creditor (See Appellants' Op. Br. p. 24, note 7).

It is likewise true that "the concept of fair market value necessarily implies a reasonable time in which to make the sale". But a "reasonable time" to sell what? Suppose that a secured creditor had a lien upon a carloan of a million nuts and bolts. Is the "reasonable time" the time necessary to sell the nuts and bolts individually or is it the time to sell them as a stock?

Williams implies that Metropolitan's objection to the delay in liquidating its indebtedness is less meritorious because of the delay brought about by Metropolitan's efforts to seek review of the orders in question (Answering Brief of Appellee Williams Construction Company, pp. 18-19). Such reasoning is as perverse and indefensible as any of which Metropolitan can conceive. The bankruptcy court entered orders which Metropolitan regards as illegal and prejudicial to its interests. Metropolitan has taken appropriate steps through proper judicial channels to seek review of those orders and to vindicate its position. What Williams is apparently saying, in effect, is that a litigant should forego review of judicial actions when further injury to the litigant may result from the process of review. According to this kind of logic, no one should sue for defamation because the suit gives further currency to the defamatory material. Indeed, a person from whom money has been stolen should not sue to recover it because more money will be spent in the judicial process.

In summary, nothing that Williams says can conceal one simple, unavoidable and dispositive fact—the orders of the bankruptcy court, entered in a Chapter XI proceeding in which only the rights of unsecured creditors may be affected, abridge Metropolitan's substantive legal rights.

V.

There Is No Realizable Equity in the Property.

The sole purpose—and hence justification—for the order restraining Metropolitan from foreclosing its deed or trust was to confer a benefit upon the debtor's estate through the preservation, for the estate, of any surplus which could be realized from the sale of the subject property over and above the amount of the encumbrances. Unless the bankruptcy court has the power to order the sale of the property in a manner which will produce such a surplus—and the only way in which this could conceivably be done is by impairing Metropolitan's substantive rights by ordering a sale of individual lots free of the lien—the justification for the order collapses. Williams' entire argument that there is an equity rests upon the assumption that the bankruptcy court has the power to order such a sale; but as Metropolitan demonstrated in Sections III and IV, *supra,* it does not (See Appellants' Op. Br. pp. 13-25).

VI.

The Orders of the Bankruptcy Court Are Illegal Because Their Implementation Will Cause Metropolitan Substantial Injury.

A court may restrain a secured creditor from foreclosing under its deed of trust or order the sale of encumbered property free and clear of liens only when such orders do not cause substantial injury to the secured creditor. In this case the orders in question in-

jure Metropolitan in several ways. The nature of the injury is shown in Appellants' Opening Brief at pp. 27-32. Nothing in the Answering Brief of Appellee Williams Construction Company in any way vitiates the force of that showing.

Respectfully submitted,

McKenna & Fitting,
Daniel N. Belin,
Aaron M. Peck,
By Aaron M. Peck,
Attorneys for Appellants Metropolitan Savings and Loan Association and Fidelity Savings Corporation.

No. 22366.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

METROPOLITAN SAVINGS AND LOAN ASSOCIATION, a corporation, and FIDELITY SERVICE CORPORATION, a corporation,

Appellants,

vs.

WILLIAMS CONSTRUCTION CO., a corporation, and A. J. BUMB, Receiver,

Appellees.

APPELLANTS' REPLY BRIEF.

FILED

JUL 1 1968

WM. B. LUCK CLERK

MCKENNA & FITTING,
DANIEL N. BELIN,
AARON M. PECK,

427 West Fifth Street,
Los Angeles, Calif. 90013,

Attorneys for Appellants Metropolitan Savings and Loan Association and Fidelity Service Corporation.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

Page

I.

Preliminary Statement 1

II.

Under California Law, Williams Has No Right to a Partial Reconveyance From Metropolitan's Deed of Trust 1

III.

The Powers of the Bankruptcy Court to Order the Sale of Encumbered Property Free and Clear of Liens and to Determine Whether the Sale of the Bankrupt's Property Shall Be in Bulk or in Parcels Are Powers to Determine the Procedure by Which the Estate Shall Be Liquidated; Neither Separately nor Together Do They Permit the Bankruptcy Court to Abrogate the Substantive Legal Rights of Secured Creditors in a Chapter XI Proceeding 7

IV.

The Orders of the Bankruptcy Court Impair Metropolitan's Substantive Legal Rights 9

V.

There Is No Realizable Equity in the Property 18

VI.

The Orders of the Bankruptcy Court Are Illegal Because Their Implementation Will Cause Metropolitan Substantial Injury 19

VII.

Conclusion 19

TABLE OF AUTHORITIES CITED

Cases — Page

Beardsley, In re, 38 F. Supp. 799 ... 17

Bradbury v. Thomas, 135 Cal. App. 435 ... 6, 7

Chaffee County Fluorspar Corporation v. Athan, 169 F. 2d 448 ... 9

Conley v. Poway Land & Inv. Co., 232 Cal. App. 2d 22 ... 4

Sacramento S. F L. Company v. Whaley, 50 Cal. App. 125 ... 4

Securities and Exch. Com'n v. United States R. & Imp. Co., 310 U.S. 434 ... 9

United States v. National Furniture Company, 348 F. 2d 390 ... 9

Statutes

Bankruptcy Act, Sec. 306(1) ... 8

United States Code Annotated, Title 11, Sec. 706-(1) ... 8

Textbook

9 Collier on Bankruptcy, Sec. 7.05(4) ... 9

No. 22366.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Metropolitan Savings and Loan Association, a corporation, and Fidelity Service Corporation, a corporation,

Appellants,

vs.

Williams Construction Co., a corporation, and A. J. Bumb, Receiver,

Appellees.

APPELLANTS' REPLY BRIEF.

I.

Preliminary Statement.

Appellants Metropolitan Savings and Loan Association ("Metropolitan") and Fidelity Service Corporation submit this brief in response to the Answering Brief of Appellee Williams Construction Co. ("Williams") and Appellees' Brief of A. J. Bumb ("Bumb"). Where the answer to a contention advanced by Appellees embraces material set forth in Appellants' Opening Brief, Appellants will cite to and summarize such material herein rather than setting it forth *in extenso.*

II.

Under California Law, Williams Has No Right to a Partial Reconveyance From Metropolitan's Deed of Trust.

In their Opening Brief, Appellants pointed out that under California law a trustor has no right to the partial reconveyance of property subject to a deed of

trust in the absence of a provision in the deed of trust authorizing such a reconveyance; and that when the deed of trust does provide for a partial reconveyance, a trustor, in order to be entitled to such partial reconveyance, must comply with the conditions which the deed of trust prescribes therefor (Appellants' Op. Br. pp. 13-15).

In the instant case, the deed of trust expressly provided that Williams was entitled to the release of individual lots from Metropolitan's lien only if two conditions were satisfied: (1) the loan which Metropolitan's deed of trust secured was not mature; and (2) the loan was not in default. At the time of the entry of the order of the bankruptcy court authorizing partial reconveyances from Metropolitan's encumbrance, the loan was both mature and in default. Because the conditions were not satisfied, Williams had no right to a partial reconveyance.

Neither of the Appellees directly dispute Appellants' statement of the law, but Williams makes two contentions in an effort to avoid its effect:

1. That, regardless of any right of Williams to secure the release of individual lots from the deed of trust to which the bankruptcy court may have succeeded, the instant case "involves the power of the Bankruptcy Court to order a judicial sale of encumbered property, free of the encumbrance, and to determine the manner of sale appropriate in the circumstances." (Answering Brief of Appellee Williams Construction Company, p. 23). The argument is answered by Appellants in Sections III and IV, *infra.*

2. That the California courts have decided cases involving the right to the partial release of security from a lien on an "*ad hoc*" basis, and because this is a bankruptcy situation the California

courts would, if given the opportunity, override the settled rule that the right to a partial reconveyance of security is governed by the terms of the security instrument. To quote Williams, "In a case in which the rights of the secured creditors can be protected,[1] and the rights of third parties are at issue,[2] there is considerable reason to believe the California courts would give effect to a release clause [notwithstanding the fact that the conditions for release contained in the release clause are unsatisfied]" (Answering Brief of Appellee Williams Construction Company, p. 26).

Insofar as the second argument is concerned, what Williams bases its conclusion on, except wishful thinking, is not clear; certainly the authorities cited by Williams do not support it.

---

[1]This is a purely hypothetical assumption—the rights of Metropolitan in this case have manifestly not been adequately protected (See Sections IV and VI, *infra*).

[2]Throughout its brief, Williams seeks to picture itself as the solicitious protector of (presumably small and defenseless) unsecured creditors, while portraying Metropolitan as the corporate counterpart of the nineteenth century stage villain. It contends that this Court should dispose of the present appeal favorably to Williams in the interests of these anonymous but omnipresent third parties "who have created the value that exists in the property by cutting lots out of raw acreage, installing the curbs, paving the streets, putting in the underground utilities, and carrying out all of the other activities requisite to manufacturing lots" and "who will otherwise lose everything" (Answering Brief of Appellee Williams Construction Company, p. 12).

The argument is faulty for several reasons. First, the facts do not support it. There is no evidence in the record of which Metropolitan is aware to indicate either the source of the claims of these unsecured creditors or that a ruling in favor of Metropolitan would cause them to "lose everything." Further, and more fundamentally, the function of the bankruptcy court is to protect all interests in accordance with law and not to rule in accordance with a desire to equalize wealth.

The first case discussed by Williams in this connection is *Sacramento S. F. L. Company v. Whaley,* 50 Cal. App. 125 (1920), in which the court held that the trustors were entitled to the reconveyance of a portion of their security, even though the loan was in default.

The difficulty with the *Whaley* case for Williams' purposes—a difficulty recognized by Williams[3]—is that the reconveyance was not in contravention of the terms of the deed of trust; rather, *it was expressly authorized by it.* The deed of trust did not limit the exercise of the right to reconveyance to the period during which the loan was not in default, but provided simply that:

> " 'Said mortgagee shall release any ten acre lot or more from the lien of this mortgage upon the payment by the said mortgagors to the mortgagee of one hundred and twenty-five ($125.00) per acre for each acre so to be released.' " (50 Cal. App. 126).

Indeed, the issue before the court was whether the *fact of default itself* would vitiate the right to a partial release of security *authorized by the terms of the deed of trust.* There is nothing whatever in the case which suggests that contractual limitations upon the exercise of the right to a partial reconveyance would not be enforced as stringently in a bankruptcy situation as in any other.

Another case relied upon by Williams is *Conley v. Poway Land & Inv. Co.,* 232 Cal. App. 2d 22 (1965), cited by Appellants on page 14 of their Opening Brief.

Williams' treatment of the *Conley* case is highly misleading because it indicates that the case upheld the right of a trustor to the release of property subject to a deed

---

[3]"In this case [*Whaley*], the parties did not attempt to place any limitation on the operation of a release clause." (Answering Brief of Appellee Williams Construction Company, p. 24).

of trust in contravention of the terms of the applicable release provision. In fact the contrary is true.

The governing contractual provision, of which Williams conveniently ignores all but the first phrase, is as follows:

> " 'So long as the trustor be not in default concerning any of the covenants contained herein or with respect to the payments due on the promissory note secured hereby, a partial reconveyance may be had and will be given from the lien or charge hereof of any portion of the property herein before [sic] described upon payment of an amount to apply on the principal of said note, based on a rate of $1,149.00 for each acre. . . . Trustor may at any time make a payment to Trustee, for the purpose of securing a partial reconveyance in which event Trustee shall, without the necessity of any approval by Beneficiary or Beneficiaries or the securing of any further documents, make a partial reconveyance of such portion or portions of the property hereinbefore described as Trustor may request provided only so much acreage shall be reconveyed as Trustor has paid for at the rate per acre mentioned in this paragraph. . . .' " (232 Cal. App. 2d 25).

The trustor made the required payment before default but did not request a reconveyance until after a default had occurred. Hence, the question before the court was whether the occurrence of the default would have the effect of divesting the trustor of a right to a partial reconveyance which accrued upon the making of the required payment in timely fashion. The court held:

> "We interpret *the language of the deed of trust to mean* that no right to reconveyance could accrue while the trustor was in default but that it has no application to such rights accrued before default." (232 Cal. App. 2d 27; emphasis added).

In other words, the court gave effect to the terms and conditions of the security instrument as it construed them. There is nothing whatever in the opinion to suggest a disposition on the part of the California courts to subvert the rule that the right to the partial release of security from an encumbrance is governed by the terms of the encumbrance. Indeed, the case supports that rule.[4]

Finally, Williams' treatment of *Bradbury v. Thomas*, 135 Cal. App. 435 (1933) can only be regarded as an admission of the weakness of its position. Williams quotes a passage from the opinion and characterizes that passage as indicating that the trial court might have reached a different conclusion had "equitable considerations" been before it (Answering Brief of Appellee Williams Construction Company, p. 24).

A reading of the passage demonstrates that no such inference can properly be drawn therefrom and that, in fact, the court held that in the absence of a contractual provision authorizing it, there is no way for a trustor to obtain the partial release of security from a lien:

> "It is obvious that appellants rely solely upon the release clause of the mortgage. This must be so for it is the only provision which furnishes any force to their claim that they are entitled to have their title to fifteen lots quieted against respondent's mortgage lien. Certainly, if the mortgage had contained no release provision there could have been no pretense on their part that they were en-

---

[4]Furthermore, Appellants wish to emphasize, as they did in their Appellants' Opening Brief, that this is not a situation in which a secured creditor is attempting to exploit a mere technical noncompliance with conditions; the noncompliance with the conditions for partial reconveyance is gross (See Appellants' Op. Br. p. 15).

titled to have any of the mortgaged premises declared freed from the mortgage lien." (135 Cal. App. 442).[5]

III.

The Powers of the Bankruptcy Court to Order the Sale of Encumbered Property Free and Clear of Liens and to Determine Whether the Sale of the Bankrupt's Property Shall Be in Bulk or in Parcels Are Powers to Determine the Procedure by Which the Estate Shall Be Liquidated; Neither Separately nor Together Do They Permit the Bankruptcy Court to Abrogate the Substantive Legal Rights of Secured Creditors in a Chapter XI Proceeding.

Appellees' principal defense of the action of Referee Kinnison in ordering the sale of individual lots free and clear of Metropolitan's deed of trust is that it involved the exercise of power conferred by Federal law and independent of any power acquired through succession to the rights of the bankrupt (or, in this case, debtor). Reduced to essentials, what Appellees are saying is that the powers of the bankruptcy court include the following:

1. The power to sell encumbered property, free and clear of liens;
2. The power to determine whether the assets of the bankrupt estate shall be sold in bulk or in parcels,

---

[5]How Williams can quote the statement from the *Bradbury* case " 'if the mortgage had contained no release provision there could have been no pretense on their [the mortgagors'] part that they were entitled to have any of the mortgaged premises declared free [sic] from the mortgage lien' " and then argue that had there been no release provision in the Williams' deed of trust "it is rather clear that the court could have ordered a sale in parcels or lots" (Answering Brief of Appellee Williams Construction Company, pp. 24-25) is frankly incomprehensible to Appellants. The *Bradbury* case makes it emphatically clear that it is only when there *is* a release provision that the mortgagor is entitled to the release of a portion of his security.

dened with a frozen asset. (For a discussion of the particularly adverse consequences of such an asset upon a saving and loan association, see Appellants' Op. Br. pp. 28-30).

2. The security for Metropolitan's loan consists at the present time of a tract of substantially contiguous lots subject to development on an integral basis. The effect of the order that the lots are to be sold on an individual basis free and clear of Metropolitan's lien would be to transform the character of that security into an aggregation of non-contiguous lots not subject to such development.

3. Metropolitan made a loan to Williams of eight months duration. The effect of the orders in question is to rewrite the loan into a loan for the duration of the time required to sell off the lots, probably a period of many years.[7]

Since Appellees' answer to the foregoing consists in large measure of a recital of the findings of Referee Kinnison and argument based upon those findings, Appellants wish to emphasize that the instant appeal is not predicated upon the contention that the findings of fact entered by the bankruptcy court are erroneous.[8]

---

[7]The foregoing contrasts sharply with Williams' narrow and incomplete characterization of Appellants' position (Answering Brief of Appellee Williams Construction Company, p. 17).

[8]Obviously Appellants do not accept findings such as "there is a substantial equity of the debtor in the said property" [C.T. p. 69, lines 31-32] or that "a sale of said lots free and clear of the lien of the respondent Metropolitan Savings and Loan Association will in no way impair any substantive right of said respondent" [C.T. p. 70, lines 10-13]. These, however, are not really findings of fact but, rather, conclusions as to the legal effect of facts which are the subject of other findings. While Appellants do feel that the findings entered by the bankruptcy court are defective for failure to find on the material issues, it is clear from the record that if such findings had been made they

The dispute between Appellants and Appellees is not as to the facts but rather as to *the legal effect of facts which, in their material respects, are undisputed.* (Appellees' argument that there is no evidence in the record to support certain facts allegedly relied upon by Appellants is wrong: as demonstrated *infra,* either there *is* such evidence, or the fact is not one upon which Appellants relied.) Hence, rules which limit the role of an appellate court with respect to questions of fact resolved by the trier of fact have no application here.

Williams asserts that the order for the sale of the lots "was fully consistent with the intentions and the expectations of the parties at the time they entered the agreement." As evidence of the intent it cites the character of the lots and that under the terms of Metropolitan's deed of trust, Metropolitan "valued each lot separately."[9] (Answering Brief of Appellee Williams Construction Company, p. 14).

Although the deed of trust does provide for the release of individual lots, the parties contemplated that such release would be permitted only in a "going" situation in which regular payments were being made on the indebtedness and the property was being sold off on a normal basis. This has little relationship to the contemplation of the parties in a salvage situation. In-

---

would have been in Appellants' favor. For example, there is no finding on the amount which the lots could be expected to bring if sold as a tract, and Metropolitan objected to the absence of such a finding [C.T. p. 63, lines 15-26]. The evidence that a sale on this basis would not yield a surplus over and above the indebtedness secured by Metropolitan's lien is, however, clear and uncontradicted [R.T. p. 310, lines 5-10].

[9]This is incorrect. The deed of trust did not purport to ascribe a value to the lots but only to prescribe the amount by which the principal indebtedness of Williams to Metropolitan would have to be reduced prior to maturity and absent a default in order to secure the release of a given lot from Metropolitan's encumbrance.

deed, the limitations upon Williams' right to secure the release of individual lots—including a fixed date (the maturity date of the loan) after which no further releases would be permitted, and a requirement that the loan not be in default—clearly indicate a desire and intent on the part of Williams *and* Metropolitan to preserve the tract character of the land in the event the project ran into difficulty.

Williams' attempt to equate the tract to "two lots located in separate parts of the state" is so plainly contrary to the facts as to be ludicrous (Answering Brief of Appellee Williams Construction Company, p. 14). The two pages of Williams' brief, pages 15 and 16, devoted to quoting findings of Referee Kinnison relating to such matters as the lot numbers, zoning, proximity to streets, elevation, topography, curbs, gutters and utilities cannot obscure the simple fact that at present the property consists of a tract of 109 substantially contiguous lots susceptible to development on an integral basis. It would become progressively less susceptible to such development if individual lots were to be sold off until, at some point, integral development would be precluded (See Appellants' Op. Br. pp. 22-23, 31-32). Williams' claim that this is not a situation in which "a filling station could be constructed in the middle of what might otherwise be a golf course" (Answering Brief of Appellee Williams Construction Company, p. 14), while true, merely means that the order of sale could be even more outrageous if circumstances were different; that does not make it acceptable under existing circumstances.[10]

---

[10]Williams' suggestion that Metropolitan's opposition to the orders in question is motivated by a desire to secure for itself the surplus over Metropolitan's indebtedness which such a lot by lot sale of the tract would allegedly produce (Answering Brief of Appellee Williams Construction Company, pp. 11-12) is totally without evidentiary support. Indeed, there is evi-

Williams' assertion that the factual basis for Metropolitan's claim that its substative rights will be impaired by the order of sale consists "almost exclusively of speculation" (Answering Brief of Appellee Williams Construction Company, p. 17) reflects both ignorance of the content of the record on appeal and a misconception of Metropolitan's position.

The statement that "[t]here is no evidence that the time of sale [of the lots on an individual basis] would necessarily be 'three, four or five years'" (*ibid*) is flatly untrue. Taylor Dark, an expert witness, testified based upon detailed land development and demographic studies that approximately four years would be required to sell off the lots [R.T. p. 279, line 8, to p. 286, line 9].

If that were not enough, we have Williams' own experience. Harold E. Williams, the president of Williams Construction Company, testified to the intensive efforts that he made to sell the lots prior to the commencement of Chapter XI proceedings:

> "Q. [by Metropolitan's counsel] Did you make any attempt whatsoever prior to January 27, 1966 [the date on which Chapter XI proceedings were commenced] to dispose of any portion of the 109 lots, any one of them or any two of them or any of them?
>
> "A. [by Williams] *I made constant efforts to dispose of them.*" [R.T. p. 159, line 26 to p. 160, line 4; emphasis added].

---

dence directly to the contrary: when Metropolitan felt that there was a likelihood that it would acquire the lots through purchase at foreclosure, it expressed a clear desire to resell the entire tract as a tract [See R.T. p. 370, line 2, to p. 371, line 9; R.T. p. 411, lines 3-16; R.T. p. 421, lines 3-9]. Furthermore, the foreclosure of Metropolitan's deed of trust would occur at a public sale. If this alleged "third of a million dollar profit" is such a lure to Metropolitan as Williams purports to believe, surely it would attract others also; and a third party might well wind up buying the tract.

While Williams was extremely vague as to the dates on which these "constant efforts" were being made [R.T. p. 160, line 8, to p. 164, line 25], it is evident from his testimony that an attempt to sell off the tract was in progress during all or most of 1965. In its sales program Williams employed several brokers, one of whom had an exclusive listing for approximately six months and the other an exclusive listing for approximately three months. There is no evidence that these brokers were anything less than diligent in their sales efforts, and by Williams' own admission one of the brokers, Agnes Kerr, "ran advertising and made the normal sales efforts" and "impressed [him, Williams] with her approach to the area" [R.T. p. 169, lines 1-12; R.T. p. 170, lines 1-15; R.T. p. 171, lines 4-25].

What was the measure of Williams' success? A quotation from the Answering Brief of Appellee Williams Construction Company, page 16, is a complete answer to that question:

> "Eight of the lots of the original tract were sold in the first six months of 1965. . ."

(While twelve other lots were sold at various times during 1965, most of these were not sales at price levels which would yield a surplus over and above Metropolitan's encumbrance; one of the lots was given in satisfaction of an indebtedness and others were sold at what Harold Williams described as "absolute cost" [R.T. p. 207, line 20, to p. 208, line 3; R.T. p. 171, line 26, to p. 177, line 17]).

In other words, Williams was able to sell an average of one and one-third lots per month, before its loan from Metropolitan matured and became delinquent. There is nothing whatever in the record before this court to suggest that a receiver in bankruptcy would be any more successful than Williams, whose inability to sell the lots was what evidently drove it to recourse to

Chapter XI proceedings. Yet at the sales rate set by Williams' own experience, *approximately seven years would be required to sell off the entire tract.*

Williams is correct in its assertion that "[t]here is no evidence to indicate that the value of the unsold lots will decrease as more lots are sold" (*ibid.*). But Metropolitan never claimed that such a decrease in value would take place.[11] Williams is glibly answering an argument that Metropolitant never made.

Finally, Williams considers the "potential time delay," as Williams euphemistically describes it, in liqudating Williams' indebtedness to Metropolitan which the orders in question entail. It complacently notes that "there is a certain delay inherent in any extension of secured credit to a debtor who may ultimately be compelled to resort to the assistance of the bankruptcy law" and "the concept of fair market value necessarily implies a reasonable time in which to make the sale" (Answering Brief of Appellee Williams Construction Company, p. 18).

What Williams ignores, however, is that the source of that "certain delay" experienced when a debtor has recourse to bankruptcy proceedings is the power of the bankruptcy court to restrain secured creditors from foreclosing their security so as to preserve the *status quo* and prevent interference with its jurisdiction. The power does not permit the bankruptcy court to abridge

---

[11]What Metropolitan did say is that probably the lots remaining after an unsuccessful sales program would very likely be the least desirable and least saleable in the tract (Appellants' Op. Br. p. 32). Lots are obviously not fungible; each is unique and possesses attributes which affect its desirability and, hence, saleability. Undoubtedly factors such as price and individual preference are of some significance, but anyone who has ever been to a department store sale on the second day knows that the "picking over" process is an ever present phenomenon of the commercial world, as applicable to lots as to lingerie.

the *substantive* legal rights of a secured creditor (See Appellants' Op. Br. p. 24, note 7).

It is likewise true that "the concept of fair market value necessarily implies a reasonable time in which to make the sale." But a "reasonable time" to sell what? Suppose that a secured creditor had a lien upon a carload of a million nuts and bolts. Is the "reasonable time" the time necessary to sell the nuts and bolts individually or is it the time necessary to sell them as a stock?

Williams implies that Appellants' objection to the delay in liquidating its indebtedness is less meritorious because of the delay brought about by Metropolitan's efforts to seek review of the orders in question (Answering Brief of Appellee Williams Construction Company, pp. 18-19). Such reasoning is indefensible. The bankruptcy court entered orders which Metropolitan regards as illegal and prejudicial to its interests. Metropolitan has taken appropriate steps through proper judicial channels to seek review of those orders and to vindicate its position. What Williams is apparently saying, in effect, is that a litigant should forego review of judicial actions when further injury to the litigant may result from the process of review. According to this kind of logic, no one should sue for defamation because the suit gives further currency to the defamatory material. Indeed, a person from whom money has been stolen should not sue to recover it because more money will be spent in the judicial process.

Appellees, and particularly Appellee Bumb, attempt to justify the orders of the bankruptcy court by showing that under them Metropolitan will ultimately recover its money. Bumb argues that there is no evidence that the sale of the lots "will produce anything other than a full payment to the Appellants" (Appellees' Brief of

A. J. Bumb, p. 15) and points out that Referee Kinnison indicated that the bulk of the proceeds of the sales would be paid over to Metropolitan.[12]

Whether Metropolitan will, in fact, be paid off under the orders of the bankruptcy court is not at all clear.[13] Should it not be, Metropolitan will then be forced to look to security other than that for which it contracted to satisfy the indebtedness remaining due to it.[14]

But even if it is ultimately paid off, this does not answer the objection that Metropolitan made a loan for a limited period—not the years that a sell off of the lots on an individual basis will require (See Appellants' Op. Br. pp. 23-25).

In summary, nothing that Appellees say can conceal one simple, unavoidable and dispositive fact—the orders of the bankruptcy court, entered in a Chapter XI proceeding in which only the rights of unsecured creditors may be affected, abridge Metropolitan's substantive legal rights.

---

[12]This, incidentally, was only an oral statement made by the Referee during the course of oral argument (R.T. [November 28, 1966] p. 13, line 23, to p. 14, line 12). To the best of Appellants' knowledge there is nothing in any court order to reflect it.

[13]While "[t]here is no evidence to indicate that all of the lots *cannot* be sold on a lot by lot basis" (Answering Brief of Appellee Williams Construction Company, p. 17, emphasis added), Metropolitan has no assurance that they *can* be sold, at least at the price levels necessary to pay off Metropolitan in full. *In re Beardsley,* 38 F. Supp. 799, 803 (D.C. Md. 1941). (See Appellants' Op. Br. p. 32).

[14]Appellee Bumb states that "The Appellants argument that the property would progressively lose its character as a tract, if true, and if a part of this record, could be used as an argument on behalf of this Appellee to the effect that as property is sold the Appellant's interest in the balance of the tract would be increased. The Appellee then would be in the position ascribed to the Appellants by the opening brief of the Appellants." (Appellees' Brief, p. 15). The statement is frankly unintelligible to Appellants and Appellants are therefore unable to respond to it.

V.

There Is No Realizable Equity in the Property.

The sole purpose—and hence justification—for the order restraining Metropolitan from foreclosing its deed of trust was to confer a benefit upon the debtor's estate through the preservation, for the estate, of any surplus which could be realized from the sale of the subject property over and above the amount of the encumbrances. Unless the bankruptcy court has the power to order the sale of the property in a manner which will produce such a surplus—and the only way in which this could conceivably be done is by impairing Metropolitan's substantive rights by ordering a sale of individual lots free of the lien—the justification for the order collapses. Appellees' entire argument that there is an equity rests upon the assumption that the bankruptcy court has the power to order such a sale; but as Appellants demonstrated in Sections III and IV, *supra,* it does not (See Appellants' Op. Br. pp. 13-25).[15]

---

[15]Appellee Bumb indicates that Appellants are seeking to reformulate the definition of "fair market value" employed by Referee Kinnison (Appellees' Brief of A. J. Bumb, p. 8). This is misleading. Let us assume, *arguendo,* that the definition of "fair market value" set forth by Referee Kinnison—" 'The amount in cash that in all probability would be arrived at by fair negotiation between an owner willing to sell and a purchaser willing to buy, given a reasonable time to negotiate.' " [R.T. p. 393, lines 2-9]—is correct. This still does not identify *what* is being sold. Referee Kinnison found the fair market value of the lots if sold individually. But since it is only as a tract that the lots *can* be sold, it is the "fair market value" *of the tract, not of the lots individually,* that is relevant for purposes of the instant proceeding. Because a person does not normally buy an entire tract of lots for his own use, the fair market value of the tract is its value to someone who is buying them for resale; and someone buying them for resale would, of course, expect to make a profit.

VI.

The Orders of the Bankruptcy Court Are Illegal Because Their Implementation Will Cause Metropolitan Substantial Injury.

A court may restrain a secured creditor from foreclosing under its deed of trust or order the sale of encumbered property free and clear of liens only when such orders do not cause substantial injury to the secured creditor. In this case the orders in question injure Metropolitan in several ways. The nature of the injury is shown in Appellants' Opening Brief, at pages 27-32. Nothing in the Answering Brief of Appellee Williams Construction Company or the Appellees' Brief of A. J. Bumb in any way vitiates the force of that showing.

VII.

Concluson.

The decision of the Court below is erroneous. It should be reversed with directions to vacate the referee in bankruptcy's order restraining Metropolitan from foreclosing its deed of trust and order authorizing the sale of the lots subject thereto free and clear of Metropolitan's lien.

Respectfully submitted,

McKenna & Fitting,
Daniel N. Belin,
Aaron M. Peck,
By Aaron M. Peck,

Attorneys for Appellants Metropolitan Savings and Loan Association and Fidelity Service Corporation.

No. 22368

In The
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

55.2 ACRES OF LAND, more or less in Yakima County Washington, and WILLIAM J. FOX, JR., et al.,

Appellants.

BRIEF OF APPELLANT

KENNETH C. HAWKINS
Attorney for Appellant

419 Miller Building
Yakima, Washington 98901

FRANKLIN PRESS YAKIMA, WASH.

FILED
AUG 1 1968
WM. B. LUCK, CLERK

SUBJECT INDEX

	Page
JUDGMENT BELOW	1
STATEMENT	2
SPECIFICATION OF ERRORS	2
1.	2
2.	4
3.	6
SUMMARY OF ARGUMENT	7
APPELLANT'S ARGUMENT	8
I.	8
II.	11
CONCLUSION	16

TABLE OF AUTHORITIES

CITED CASES

Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 43 S. Ct. 442, 67 L. Ed. 809	15
Clark v. U.S., 155 F.(2d) 157 (8th Circuit)	15
Sedro Woolley v. Willard, 71 Wash. 646, 129 P. 372	15
Stephenson Brick Co. v. United States, 110 F.(2d) 360	15
U. S. v. 2.4 Acres of Land, 138 F.(2d) 295 (7th Circuit)	15
U. S. v. 70.39 Acres of Land, 165 F. Supp.	15

TEXTBOOKS

72 Stat. 893	2
23 U.S.C. 107	2
1 Orgel, page 582-591	9
2 Orgel, Valuations, Section 190	15
27 Am. Jur. (2d), 351	16

No. 22368

In The
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

55.2 ACRES OF LAND, more or less in Yakima County Washington, and WILLIAM J. FOX, JR., et al.,

Appellants.

BRIEF OF APPELLANT

JUDGMENT BELOW

The judgment below was based upon a verdict of a jury, the judgment and the verdict being found on pages 147 and 148 of the clerk's transcript. The jurisdiction of the court is based upon the act of Congress approved August 1, 1888, the Act of February 26, 1931, and the Act of August 27, 1958, authorizing the acquisition of land required for right of way in connection with the improvement of any section of the national

system of inter-state and defense highways (72 Stat. 893; 23 U.S.C. 107).

STATEMENT

This action was instituted by the United States of America to acquire a right of way for the construction of Interstate Highway 82 (Tr. 1). The property of appellant lies just south of the town of Union Gap, a small commercial and industrial center in Yakima County, is but a few hundred feet from the city limits, and is served with all utilities including telephone, light, power and water. Before the take, appellant's property was used industrially, and for residential purposes. Appellant was engaged in a housemoving business and utilized the premises not only as his home but as a yard for his housemoving equipment, and a maintenance depot. Appellant's property was so completely taken that it was necessary for him to relocate.

SPECIFICATION OF ERRORS

1.

The trial court erred in excluding evidence of the sale of Floyd to Fox (Tr. 85-119) (Reporter's transcript pages 165-181). Said sale was the property immediately adjacent to the subject property, was a sale that was committed by earnest money receipt prior to the time of the take, and completed by the execution of a contract subsequent to the time of the take and was a

sale more indicative of land values than any other comparable cited.

The question and objection are as follows (Reporter's Transcript 165, et seq):

"Q. Mr. Lemon, didn't you close in your office a sale from Mr. Floyd to Mr. Fox on August 24, 1964?

A. Yes, I did.

MR. HULL: If the Court please, I am going to object to this purported sale on several grounds. First, this document is an offer to sell, it is not a completed sale; secondly, that the sale in question was completely after the date of taking in this case actually; thirdly, that it was influenced by the project and not comparable, therefore.

MR. HAWKINS: This comparable was one that took place, and the earnest money receipt, which is the document in your hands, was signed by both parties prior to the date of take. The contract carrying out that agreement was entered into after the filing of the papers here in court on August 31, 1964. We contend that it is a free and open market sale, closed by Mr. Lemon in his office, he was paid a commission on it according to the terms of that document that is in your hands, and it establishes that the fair market value of this property is $1,500.00 per acre."

The Court sustained the objection upon the following ground (Reporter's Transcript, page 169, 173):

"THE COURT: Well I have been involved with livestock all my life, and I can't visualize anyone paying $1,500.00 an acre for pasture land. He would have to raise gold-plated cattle in order to come out. It just isn't logical; there is something about this that has to be different than pasture land."

"THE COURT: But Fox testified that he couldn't use

the freeway, and the judge heard that at that time; so how can you contend, Counsel, that that was the basis of his ruling, because he heard the testimony of Fox to the contrary. Fox said he couldn't get a permit to use the freeway in his housemoving business.

MR. HAWKINS: Well maybe I don't make myself clear, but the point I am making is that there is nothing in that transcript to support Judge Powell's ruling. Mr. Fox testified that he was not influenced by the coming of the freeway when he bought that."

2.

The trial court erred in sustaining an objection to the testimony of Mr. Clarence Marshall as to replacement cost of the buildings on appellant's property (Reporter's transcript 317), and in sustaining an objection to an offer of proof of testimony by the same witness that the cost less depreciation of the improvements on the land of appellant would be $35,000.00 (Reporter's transcript page 347, 348).

The record shows the question, the objection, the offer of proof as follows (Reporter's transcript, page 317):

"Q. Mr. Marshall, can you tell us the replacement cost on August 31, 1964, of the home—

MR. HULL: Object to the question. If the Court please, this is not a proper approach to valuation; no evidentuary purpose.

MR. HAWKINS: I think it is admissible; replacement cost is one of the standards of arriving at value, replacement less depreciation, your Honor.

MR. HULL: Cost less depreciation is only resorted to when there is no other, particularly fair market value approach. It certainly is not admissible in this case."

The record further shows, page 318:

"MR. HAWKINS: Your Honor, it is a generally accepted method of appraisal recognized by all real estate people in arriving at fair market value; you can either arrive at it from the basis of comparable sales, you can arrive at it from capitalized income or rentals, or you can arrive at it by replacement cost less depreciation. This is one of the recognized and accepted methods of arriving at values. There are the three recognized methods. There is no law that you must resort strictly and solely to the comparable sale method. Mr. Lemon testified that he did arrive at a unit value which he did apply in arriving at his figures, and this evidence would go in to refute or rebut that."

Further, the record shows that the Court in sustaining the objection stated, page 335:

"So how can you contend that you resort to other evidence such as reproduction cost in a case where there is ample opportunity to determine fair market value from other sources, Mr. Hawkins?

MR. HAWKINS: For two reasons, Your Honor. One of them is, it tends to refute the testimony of the experts called by the government, and the other reason is that it is direct evidence of value. In 2 Orgel on Valuation, Section 190; 'It is now the prevailing rule that estimates of reproduction costs may be introduced on direct examination whenever the buildings are well adapted to the land on which they stand.' "

Appellant also stated, page 339:

"MR. HAWKINS: Except for the one thing, the question of whether or not the buildings are well adapted to the uses to which the land is devoted. Now if the building is well adapted to the land, then it seems to me the cost of reproduction

less depreciation is a valid criterion, because the buyer is going to take that into consideration."

with the Court finally concluding as follows:

> "So I am inclined to go along with the decision of Judge Carter, and the general rule as he sets it forth, and therefore, it is the ruling that this evidence is not admissible in this particular case, because it is condemnation of property where you can establish fair market value outside of actual reproduction cost."

The offer of proof is as follows, page 347:

> "We offer to prove by the witness who was on the stand, Clarence Marshall, who is a competent and successful builder, and who has personal familiarity with buildings in question, that the cost less depreciation of the home which is Exhibit 68, is $11.00 a square foot, and that the cost less depreciation of the residence is $11.00 a square foot, and the cost less depreciation of the shop is $5.50 a square foot.
>
> * * *
>
> "The cost less depreciation of the improvements on the land would be in the neighborhood of $35,000.00."

3.

The trial court erred in denying appellant's motion for a new trial.

The basis of the specification of error is the trial court's ruling with respect to specification of errors Nos. 1 and 2.

SUMMARY OF ARGUMENT

The trial court excluded the most significant comparable sale testified to by any of the experts, the sale from Floyd to Fox. The property was immediately adjacent to the subject property. It was committed by the execution of an earnest money receipt, a few days before the take, and fulfilled by the execution of the written contract a few days after the take. It was adjacent to Union Gap and like the subject property was in the so-called flood plain of the Yakima River, but was adjacent to State Highway 3, one of the main arterials from Yakima through Union Gap to the lower Yakima Valley. Fox did not buy the property because of the new proposed freeway, as he could not use the freeway in his housemoving business. He bought it for the purpose of re-establishing his business in the most suitable location. It should have been admitted to help guide the jury in evaluating the opinions of the experts.

The trial court also erred in refusing testimony as to reproduction, cost less depreciation of the buildings located upon the subject property. The expert witnesses for the plaintiff, appellee here, did not identify or refer to any sale of property *with comparable improvements.* The exclusion of this evidence materially affected the outcome of the case, as the jury was left completely uninformed as to the actual fair market value of the property *with the buildings* as a whole.

APPELLANT'S ARGUMENT

I.

An examination of the maps and aerial photos will establish that the subject property is adjacent to the town of Union Gap, a growing commercial and industrial community immediately south of the City of Yakima in Yakima County, Washington. The subject property at the time of the take was located upon U.S. Highway 97, State Highway 3. These highways had existed for some 25 or 30 years prior to the take. The property was used by appellant as headquarters for a housemoving operation. It consisted of several buildings to house the housemoving equipment and trucks and a yard for the assembly of such equipment. There was also located on U.S. Highway 97 two rental units and the home of appellant Fox. The land upon which these improvements were located was at the same level or grade as U.S. 97. To the east of the improvements the land dropped off into the so-called flood plain of the Yakima River. In that area Appellant Fox grazed and fed a few cattle. The experts for the appellee testified that the highest and best use of the subject property was that to which it was already being put, i.e., residential, rental and for a housemoving operation. (Reporter's Transcript pages 257 et seq. and 294 et seq.)

Prior to the take, appellant Fox noticed adjacent to his property a sign posted by George Lemon, one of the experts for the appellee, offering the property of Mr.

Floyd for sale. Mr. Fox then proceeded to George Lemon's office (the same George Lemon who was retained by appellee as its real estate expert and who testified on behalf of the appellee) and proceeded to negotiate the purchase of that property, Mr. Lemon collecting a full commission and the parties executing a valid and binding contract. Upon cross examination of Mr. Lemon, objection was sustained to a reference to that sale by the trial court. (Reporter's transcript pages 165-181) (Clerk's Transcript pages 85-119). There is little doubt that the admission of this particular comparable would have been destructive to the testimony of the experts for the appellee. It was closest to the take both in time and distance and it was virtually identical and could not help but establish proper fair market value. The admission of this comparable would undoubtedly have affected the verdict of the jury, yet it was excluded as we understood it, because the trial court felt that the purchase was influenced by the proposed new freeway, *yet there was no evidence to that effect.* On the contrary, Mr. Fox testified that the freeway had no bearing upon the purchase as in the housemoving business he was not allowed on the freeway. He testified that he had searched all over the area both above and below Union Gap, and could find nothing on U.S. 97 that was suitable, and for that reason he bought it. Clearly, the comparable was admissible. On Orgel, Volume 1, page 582-591, it is stated:

"In most jurisdictions, the courts have followed

the rule that evidence of sales of other similar property in the neighborhood is admissible on direct examination to prove the market value of the property in question. * * *

"* * * Meanwhile, we must note the qualifications applied to this type of evidence even under the majority rule. The three most important limitations concern: (a) degree of similarity between the property that was the subject of the sale and the property that is being valued; (b) proximity between date of sale and date of valuation; and (c) nature of the sale, as determined by the circumstances under which it was made.

* * *

"* * * In estimating land values, the question of location is important, and the courts emphasize the fact that the properties to be compared should be situated in the same general neighborhood or vicinity. * * *

* * *

"The courts make no attempt to describe minutely the essential constituents of similarity in market conditions. They usually assume that if property similar in other respects has been sold within a reasonable time of the taking, its sale price is relevant in determining the market value of property taken. As to what constitutes a reasonable time, a wide discretion is vested in the trial court and the appellate courts are reluctant to reverse the lower court's determination as a matter of law. In the usual run of cases, a sale within a year is admitted as a matter of course. In any case, however, a finding that the evidence falls within a reasonable time does not imply that market conditions are precisely the same and it remains open to either party to dispute the significance of the sale by proving a change in market conditions. Generally speaking, the courts make no distinction between sales occurring prior to the taking and sales consummated after the date when title has vested in the condemnor."

The trial court erred in excluding the Floyd to Fox sale, and the appellant is entitled to a new trial for that reason alone.

II.

As indicated above, the subject property was improved with two rental units and a residence and buildings for the storage and maintenance of housemoving equipment and the yard for the assembly of such equipment. The property is located on U.S. 97.

Appellant sought to introduce into evidence through a qualified witness, testimony of the cost less depreciation of the improvements on the property. This offer was rejected. (Reporter's Transcript, pages 317-348).

The real estate experts testified that the highest and best use of the property was *the use to which Mr. Fox was already putting the property* (Reporter's Transcript, pages 257 and 258). (Reporter's Transcript, pages 294 and 295) Mr. Korn, appellee's witness, said on page 257:

> "Q. Do you know whether or not the owner, Mr. Fox, conducted any business on the premises, or from it?
>
> A. Yes, he had a shop building, and then he had some moving equipment; he was conducting a house-moving business at that time.
>
> Q. Did he keep any cattle in the area?
>
> A. Yes, he had a few cows.
>
> Q. What, in your opinion, prior to the taking, was the highest and best use of this property?
>
> A. Well, my opinion was that he was using it for the highest and best use. * * * Then of course

> he had three houses on the bench land, and since the houses were already there, the highest and best use of the land would be for residential use. * * * Then the balance of the property had a shop on it, and again, I think that was being used to the highest and best use of the property. I felt he was using it as good as it could be used."

Mr. Lemon, also a witness of the appellee, said, page 294:

> "Q. Right. Now going back to the parcel, what in your opinion was the highest and best use of that ownership just before the taking?
>
> A. In my opinion, the highest and best use was for suburban homesite, much as it is being used now, and also it could have some small service business such as Mr. Fox has as a housemover. I think the use it is being put to now is about as good a use as it could be put to.
>
> Q. And as to the balance?
>
> A. Well, I am taking the whole tract into consideration, because that to the east is rough pasture land, and has some recreational value; it seems to be it would be an ideal setup for suburban homesite, with some recreation toward the river."

In arriving at values, the real estate expert, Mr. Lemon, testifying on behalf of the appellee, stated as follows, page 310:

> "Q. (By Mr. Hawkins) Well, in arriving at this figure did you put a square-foot value on the home of Mr. Fox?
>
> A. I made an estimate of the entire value of each of the buildings, including Mr. Fox' home.
>
> Q. All right, what was your valuation on the home then?
>
> A. Well, I valued the home at $9,200.00.

Q. At how much?

A. $9,200.

Q. And did you arrive at that by ascribing a square-foot value?

A. Well, in a way; by comparing it to other homes of like construction and came up with the unit value that I applied.

Q. And what was the unit value?

A. The unit value on that was about seven dollars and a half.

Q. Seven dollars and a half. Now there were two other residences, were there not?

A. Yes, sir.

Q. And did you use the same unit value for those residences?

A. Well, on Number 1—

Q. On Number 1 what unit value did you use?

A. Well, I used about $6.00, so that made about thirty six hundred.

Q. And on Unit Number 2 what unit value did you use?

A. On Unit Number 2, a little over $5.00.

Q. And the shop?

A. The shop, about $1.50 a foot, or $1.60 a square foot."

While it is true that the expert, Mr. Lemon, on direct examination testified to an overall before or after value, it is thus clear that this value was built upon a price per square foot basis.

Mr. Ralph Korn, also testifying on behalf of the appellee, testified in detail as to the number of square

feet in each building, gave an overall before and after value, but in relating his opinion as to comparable sales, we find that he used comparables which either did not have any improvements on them, or did not have comparable improvements, thus arriving at land values only—with no basis in fact for the value of the improvements. He testified, page 301:

"Q. Any improvements on it?

A. No improvements on it, no, sir."

The foregoing is on direct examination. The next comparable found on page 303 of the Court Reporter's transcript again has no improvements, and again on page 304, the witness arrives at a value of the Fox property of $750.00 per acre. Not one comparable had improvements similar to the improvements that were on the subject property. Again, by the same method as Mr. Lemon, the witness placed a value on improvements by a price per square foot.

Against this type of evidence, it seemed proper to introduce actual cost less depreciation figures, particularly in view of the fact that those witnesses had already established that the highest and best use of the subject land was the use to which it was being put. In other words, these witnesses were saying that the improvements resulted in the best use of the land.

The trial court excluded the proffer of the evidence of Mr. Clarence Marshall, upon the ground that there were comparable sales (but where are they?) and upon

the case found in 164 F. Supp. 451, *U.S. v.* 70.39 *Acres of Land* (Reporter's Transcript 330).

However, with respect to the first point, no expert witness referred to any single sale involving improvements comparable to the improvements on the subject property. Furthermore, each of the witnesses arrived at their overall value by fixing a per square foot price and used that as a basis for their opinion. The case relied on by the trial court is applicable to the situation where the improvements do not relate to the best use of the land, and consequently, their cost less depreciation does not relate to fair market value. Where the improvements do relate to the highest and best use *so that the well informed buyer does not discount such improvements*, then their cost less depreciation is a factor which the reasonably well informed buyer would take into consideration and therefore does constitute a factor which the jury should be entitled to consider. We rely on 2 *Orgel, Valuations*, Section 190:

> "It is now the prevailing rule that estimates of reproduction cost may be introduced on direct examination whenever the buildings are well adapted to the land on which they stand."

This is exactly the situation in the case at bar. The foregoing authority cites *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 43 S. Ct. 442, 67 L. Ed. 809; *Stephenson Brick Co. v. United States*, 110 F. 2d 360 (5th Circuit); *U.S. v.* 2.4 *Acres of Land*, 138 F. 2d 295 (7th Circuit); *Clark v. U.S.*, 155 F. 2d 157 (8th Circuit); *Sedro-Woolley v. Willard*, 71 Wash.

646, 129 P. 372. See also 27 Am. Jur. 2d, page 351, where it is said:

> "The prevailing rule is that evidence of the reproduction cost of an improvement, with proper allowances for depreciation, is competent as a circumstance to be considering in valuing the whole property, provided that the improvement adds value to the land in reasonable proportion to such cost."

In view of the fact that the comparables cited by the experts did not relate to comparable improvements, in any way, shape or form, and in view of the fact that the appellee's experts agreed that the property was being used for its highest and best use, it would seem clear that the proffered testimony should have been admitted, and considered by the jury under appropriate instructions. The failure to admit such evidence constituted alone prejudicial error, entitling appellant to a new trial.

CONCLUSION

It is respectfully submitted that because of these errors by the trial court, appellant is entitled to a new trial.

Respectfully submitted,
KENNETH C. HAWKINS
Attorney for Appellant

APPENDIX

Exhibit No.	Identified	Received
P-1	3	3
P-6	10	15
P-5	11	15
P-2	11	15
P-8	16	18
P-8a	18	19
P-8b	18	19
P-7	18	19
P-7a	18	19
P-7b	18	19
P-4	19	20
P-4a	19	20
P-4b	19	20
P-16	26	37
P-17	37	51
P-12	76	78
P-13	76	79
P-14	79	80
P-15	81	82
P-3	102	103
P-10	254	254
P-11	297	297
P-18	415	415
P-19	415	415
P-20	415	415
P-9	475	475
D-68	323	323
D-69	324	324
D-70	324	324
D-71	325	325
D-72	326	326
D-73	326	326
D-74	327	327
D-75	327	327
D-76	450	450
D-86	462	462
D-87	462	462
D-88	462	462
D-89	470	470
D-90	470	470
D-91	470	470
D-92	470	470
D-51	472	472
D-53	472	472
D-62 to D-66	472	472

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

KENNETH C. HAWKINS
Attorney for Appellant

I N D E X

Page

Opinion below-- 1
Jurisdiction--- 1
Issues presented------------------------------------- 1
Statement-- 2
Argument:
- I. The district court properly exercised its discretion in excluding the Floyd-to-Fox "sale"---------- 6
  - A. As a matter of law, the excluded transaction was inadmissible because it was not a sale for cash or its equivalent-------------------- 7
  - B. The district court had a broad discretion to exercise in excluding or including sales evidence-- 8
  - C. Under the facts of this case, the particular exercise of discretion was clearly a proper one-- 11
- II. The district court properly refused to allow testimony concerning the cost of replacing the structures on the subject property--------------------- 13

Conclusion--- 15

CITATIONS

Cases:

Anderson v. United States, 179 F.2d 281------------ 10
Baetjer v. United States, 143 F.2d 391, cert. den., 323 U.S. 772------------------------------------ 7
Bauman v. Ross, 167 U.S. 548----------------------- 6
Carlstrom v. United States, 275 F.2d 802----------- 15
Dickinson v. United States, 154 F.2d 642----------- 7
Fairfield Gardens, Inc. v. United States, 306 F.2d 167-- 9, 15
Hickey v. United States, 208 F.2d 269, cert. den., 347 U.S. 919------------------------------------ 7
International Paper Company v. United States, 227 F.2d 201-- 10
Jayson v. United States, 294 F.2d 808-------------- 10
Kerr v. South Park Commissioners, 117 U.S. 379----- 7
Kimball Laundry Co. v. United States, 338 U.S. 1--- 10
Likins-Foster Monterey Corporation v. United States, 308 F.2d 595------------------------------------ 9
Love v. United States, 141 F.2d 981---------------- 7
Olson v. United States, 292 U.S. 246--------------- 7
Riley v. District of Columbia Redevelop. Land Agency, 246 F.2d 641----------------------------- 8

Page

Cases (continued):

Shoemaker v. United States, 147 U.S. 282--------- 6, 7, 10
United States v. Baker, 279 F.2d 603------------- 14
United States v. Becktold Co., 129 F.2d 473------ 7
United States v. Benning Housing Corporation, 276 F.2d 248------------------------------------- 14
United States v. Certain Interests in Champaign County, Illinois, 271 F.2d 379, cert. den., 362 U.S. 974------------------------------------- 13
United States v. Certain Parcels in Philadelphia (Wainwright), 144 F.2d 626-------------------- 7, 8
United States v. Certain Property in the Borough of Manhattan, 344 F.2d 142-------------------- 14
United States v. Commodities Corp., 339 U.S. 121- 6
United States v. Ham, 187 F.2d 265--------------- 7
United States v. Johnson, 285 F.2d 35------------ 9, 15
United States v. Katz, 213 F.2d 799, cert. den., 348 U.S. 857------------------------------------- 7
United States v. Leavell & Ponder, Inc., 286 F.2d 398, cert. den., 366 U.S. 944------------------ 8, 10
United States v. Miller, 317 U.S. 369------------6, 10, 14
United States v. New River Collieries, 262 U.S. 341--- 6
United States v. 124.84 Acres in Warrick County, Ind., 387 F.2d 912---------------------------- 10
Welch v. Tennessee Valley Authority, 108 F.2d 95, cert. den., 309 U.S. 688----------------------- 7
Winston v. United States, 342 F.2d 715----------- 9

Miscellaneous:

2 Orgel, Valuation Under Eminent Domain (2d ed. 1953) sec. 188--------------------------------- 14

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22368

WILLIAM J. FOX, JR., ET AL., Appellants

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district judge, Honorable William N. Goodwin, did not write an opinion.

JURISDICTION

The jurisdiction of the district court over this condemnation action is founded on 28 U.S.C. sec. 1358. Notice of appeal was filed August 18, 1968 (R. 156), from final judgment entered June 2, 1967 (R. 148-151), and an order denying appellants' motion for a new trial entered June 26, 1967 (R. 155). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

ISSUES PRESENTED

1. Whether, at a jury trial in federal condemnation proceedings, the district court properly exercised its discretion in excluding evidence of a particular sale made under circumstances indicating that it was an unusual transaction probably

influenced by the project and not a fair indication of objective market value.

2. Whether, under the circumstances of this case, the district court properly refused to allow testimony concerning the cost of replacing the structures on the subject property.

STATEMENT

This appeal arises out of condemnation proceedings instituted by the United States to acquire land in Yakima County, Washington, for the construction of an Interstate Highway (R. 3, 4). Appellants, Mr. and Mrs. Fox, were the owners of approximately 6.77 acres of land. By declaration of taking filed August 31, 1964, the United States took fee simple title to 6.12 acres of this land and a perpetual assignable easement over another 0.31 of an acre (R. 23-26).[1/] The case was tried before a jury, along with the cases of two other landowners (Duncan and Olson), from March 20, 1967, to March 24, 1967 (Tr. 1-503). The jury deliberated simultaneously on all three cases and then made three separate awards in three verdicts. Appellants' motion for new trial was denied (R. 155), and they appealed (R. 156).

1/ It was agreed that the Fox's remaining 0.34 of an acre was rendered valueless (Tr. 376-377).

With respect to the Fox property, of concern here, the Government first presented two engineers who testified to its susceptibility to flooding (Tr. 31, 54-55, 61-62, 75). The remainder of the Government's case consisted of the testimony of two expert real estate appraisers. Ralph August Kann valued the land at $26,500 (Tr. 260), while George M. Lemon valued it at $26,800 (R. 296).

At a previous stage of the trial, when George M. Lemon had testified concerning the value of the Duncan property, opposing counsel (Mr. Hawkins)[2/] sought to elicit information concerning an alleged comparable sale from Floyd to Fox on August 24, 1964 (Tr. 165). At the request of government counsel, the jury was dismissed (Tr. 166), and debate on the admissibility of this Floyd-Fox transaction ensued (Tr. 167-181). During the course of this debate, a portion of a transcript from a prior condemnation trial before Judge Powell involving a different landowner, but the same comparable sale issue, was received by Judge Goodwin and made part of the record (Tr. 172).[3/]

2/ This same attorney represented the landowners in all of the trials here mentioned.

3/ This transcript appears at pages 85-119 of the record.

That transcript, in pertinent part, consisted of the testimony of William Fox (appellant here) as to the property he purchased from a Mr. Floyd in 1964. On direct examination, Fox testified he paid $1,500 an acre for this land (R. 93), and that its proximity to the highway had not influenced his purchase price (R. 93). On cross-examination and redirect, it was brought out that Fox did not sign a land contract to buy this property until November 10, 1964 (R. 95-96), and that only an earnest money receipt dated August 21, 1964, for which Fox had given $100, had existed prior to the Government's taking, August 31, 1964 (R. 97, 105). Fox further testified that the total purchase price stated in the contract was $12,000, that he paid $3,400 at the time of the formal contract (R. 97-98) and that, while the balance of the purchase price became due at the rate of $1,000 per year every August, he had not made any payments as they became due over and above his 29% deposit (R. 98-99). Also, appellant Fox acknowledged he knew at the time of purchase that the Interstate Highway would form one boundary of the land purchased (R. 100) and that his new property would be located 300 yards from a proposed interchange on the highway (R. 103). Indeed, appellants' counsel admitted that he had drawn the boundaries of the property with full knowledge of the location of the

highway and using it as the eastern boundary of the property, having known the location of the highway for some eight years (Tr. 177-181). The transcript indicates that Judge Powell refused to admit this Floyd-to-Fox transaction as a comparable sale because he did not consider it a sale on the open market (R. 106), and because it was the subject of project influence (Tr. 180-181).

Having reviewed this transcript, Judge Goodwin (Tr. 171) designated the Floyd-Fox transaction as "unusual" (Tr. 172). Impressed by the fact that Fox did not have to make the scheduled payments on the balance due and that the highway formed one boundary of the area encompassed by the sale, the judge sustained the Government's objection to the admission of the sale (Tr. 175, 180).

Later in the trial, a Mr. Clarence Marshall, a building contractor, testified on behalf of appellants (Tr. 316-317). Defense counsel attempted to elicit Marshall's opinion of the replacement cost of the Fox property. Upon objection, the judge ruled that such evidence was not admissible (Tr. 317, 330-346). Thereafter, defense counsel offered to prove that the witness Marshall would value the improvements alone, at $35,000, using the reproduction cost approach (Tr. 347-348).

In substance, the remainder of appellants' case consisted of Mr. Fox's own presentation of photographs of his property (Tr. 322-328) and the testimony of Marion L. Pierce,

a realtor, that the Fox property was worth $45,259, immediately prior to the taking (Tr. 376).

After being instructed by the judge, the jury returned a verdict of $29,500 as the just compensation for the Fox property (R. 147). Thereafter, judgment was entered in that amount (R. 148-151), and Fox's motion for a new trial denied (R. 155). This appeal followed.

ARGUMENT

I

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING THE FLOYD-TO-FOX "SALE"

It is firmly established that fair market value is the measure of just compensation as required by the Fifth Amendment to the Constitution of the United States. _United States_ v. _Miller_, 317 U.S. 369, 373 (1943); _Shoemaker_ v. _United States_, 147 U.S. 282 (1893). And such measure must result in compensation that is just not only to the landowner but also "to the public that must pay the bill." _United States_ v. _Commodities Corp_., 339 U.S. 121, 123 (1950); _United States_ v. _New River Collieries_, 262 U.S. 341, 344 (1923); _Bauman_ v. _Ross_, 167 U.S. 548, 574, 575 (1897).

The best evidence of such fair market value is a prior sale of the same property. Baetjer v. United States, 143 F.2d 391, 397 (C.A. 1, 1944), cert. den., 323 U.S. 772; United States v. Certain Parcels in Philadelphia, 144 F.2d 626, 629-630 (C.A. 3, 1944); Dickinson v. United States, 154 F.2d 642, 643 (C.A. 4, 1946); United States v. Ham, 187 F.2d 265, 269-270 (C.A. 8, 1951); Love v. United States, 141 F.2d 981, 983 (C.A. 8, 1944); United States v. Becktold Co., 129 F.2d 473, 479 (C.A. 8, 1942). Absent such evidence, sales at arms' length of similar property are the best evidence of fair market value. Baetjer v. United States, supra, 143 F.2d at 397; United States v. Katz, 213 F.2d 799 (C.A. 1, 1954), cert. den., 348 U.S. 857; Hickey v. United States, 208 F.2d 269 (C.A. 3, 1953), cert. den., 347 U.S. 919; Welch v. Tennessee Valley Authority, 108 F.2d 95, 101 (C.A. 6, 1939), cert. den., 309 U.S. 688; United States v. Ham, supra, 187 F.2d at 269-270. Any sales offered on this basis must have been sales for cash or its equivalent. Kerr v. South Park Commissioners, 117 U.S. 379, 386-387 (1886); Shoemaker v. United States, 147 U.S. 282, 304 (1893); Olson v. United States, 292 U.S. 246, 255 (1934).

A. As a matter of law, the excluded transaction was inadmissible because it was not a sale for cash or its equivalent. - The transcript of the previous trial, which appellants offered (Tr. 171) and was made part of the record herein (R. 85-

119), reflects that Mr. Fox testified that he paid a down payment of 29% of the purchase price (R. 97-98) and was to pay $1,000 each year on the balance thereof (R. 98). Such testimony does not recite a sale for cash or its equivalent. This is so because the obligation to pay installments _in futuro_ does not represent the present cash value of the property. _Riley_ v. _District of Columbia Redevelop. Land Agency_, 246 F.2d 641, 643 (C.A. D.C. 1957). Clearly, the purchaser for cash here would pay less than the amount arrived at by adding Fox's down payment and the $1,000 a year payments spread over a period of years. In order to be admissible, some testimony must be elicited to show the present cash value of this future sum of money due under the terms of the transaction. _United States_ v. _Certain Parcels in City of Philadelphia (Wainwright)_, 144 F.2d 626, 630 (C.A. 3, 1944). See also, _United States_ v. _Leavell & Ponder, Inc._, 286 F.2d 398, 404 (C.A. 5, 1961), cert. den., 366 U.S. 944. Mr. Fox did not supply such testimony, nor was such forthcoming during the offer of proof made by his counsel (Tr. 177-181). The "sale" therefore was inadmissible as a matter of law.

B. _The district court had a broad discretion to exercise in excluding or including sales evidence_. - This Court has consistently held that the district court has a

broad discretionary power to admit or exclude sales evidence in condemnation cases. Winston v. United States, 342 F.2d 715, 720-721 (C.A. 9, 1965); Likins-Foster Monterey Corporation v. United States, 308 F.2d 595, 602 (C.A. 9, 1962); Fairfield Gardens, Inc. v. United States, 306 F.2d 167, 172 (C.A. 9, 1962); United States v. Johnson, 285 F.2d 35, 40-41 (C.A. 9, 1960). This Court has, therefore, consistently refrained from overturning the trial judge's exercise of this discretion where no manifest abuse thereof is clearly demonstrated by the record.

The sales, to be admissible, must be "comparable sales," i.e., sales of similar property, not too distant in time, consummated in a free and open market place. The discretion of the district court in judging the "comparability" of a sale was defined in Fairfield Gardens, Inc., supra (at 172-173):

> In the field of real estate valuation it has long been the rule that sales of other property are not admissible unless the other property is comparable. And comparability, while it does not mean identity, because each parcel of real property differs from every other parcel, does mean, at the very least, similarity in many respects. Here, the dissimilarities seem to us far more striking than the similarities. Under these circumstances, we do not think that the court abused its discretion in excluding the evidence.

If the property meets this criterion the sale may yet be excluded because of the nature of the transaction.

It has long been established that sales offered as evidence of value must be on the open market, that is, transactions between a willing buyer and a willing seller, eliminating those factors which "must in fairness be eliminated in a condemnation case." *United States* v. *Miller*, 317 U.S. 369, 374-375 (1943); *Shoemaker* v. *United States*, 147 U.S. 282 (1893). Thus, sales consummated after the date of taking have been excluded because of probable project influence. *Shoemaker*, *supra*; *Jayson* v. *United States*, 294 F.2d 808, 810 (C.A. 5, 1961); *International Paper Company* v. *United States*, 227 F.2d 201, 209 (C.A. 5, 1955). And the court in *Anderson* v. *United States*, 179 F.2d 281 (C.A. 5, 1950), took judicial notice that government projects influence values of adjacent properties. Similarly, sales of property of special value to the purchaser are not admissible. *United States* v. *124.84 Acres in Warrick County, Ind.*, 387 F.2d 912, 916 (C.A. 7, 1968); see *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 5 (1949). And sales not consummated for cash or its equivalent are excluded. *United States* v. *Leavell & Ponder, Inc.*, 286 F.2d 398 (C.A. 5, 1961), cert. den., 366 U.S. 944. So, the type of transaction, as well as the similarity of the property, is a crucial factor in judging the relevancy of a proffered sale.

C. Under the facts of this case, the particular exercise of discretion was clearly a proper one. - The purported sale, from Floyd to Fox, offered by Mr. Fox and excluded by the district court, was a transaction begun only 10 days before the date of taking by the execution of an earnest money receipt for $100 (R. 97, 105). The formal contract was executed some 40 days after the date of taking and Mr. Fox has not paid any of the payments called for in this contract over and above his down payment (R. 97-99). Additionally, Mr. Fox testified that he knew at the time of this transaction that the highway, subject of this project, formed one boundary of the "Floyd-to-Fox" land and was some 300 yards from a proposed interchange (R. 100, 103). Such knowledge extended back some eight years prior to the taking and allowed appellants' counsel to specify exactly the eastern line of the property so not to encroach on the highway easement (Tr. 177-181).

The district court reviewed the transaction and the attempted offer of it in a previous trial of an adjacent tract (Tr. 171). The court observed that the judge in the previous trial had rejected the sale as being influenced by the project and not a sale on the open market (Tr. 171). The court characterized the sale as "unusual" because the terms of the earnest

moeny agreement were not incorporated in the contract of sale and the payments on the balance due were "deferred on the proposal that when the purchaser got the money he would pay it" (Tr. 172). The court continued: "In my limited experience of some thirty years I have never heard of that kind of a sale of land, particularly where it was to be used as this was to be" (Tr. 172). Acknowledging that it was not bound by the rejection of the sale in a previous trial, the court nevertheless concluded that this was not an open market sale and excluded it (Tr. 172, 175). After allowing an offer of proof, the court became convinced that the transaction was additionally influenced by the project and inadmissible (Tr. 177-181). In deciding to exclude the transaction, the court weighed all the factors presented as they appeared before it. Such special accessibility to these factors, to witnesses, and to evidence, forms the logical basis for allowing a trial judge wide discretion in ruling on evidentiary questions. Herein, the district court's exclusion of the sale was a sound exercise of such discretion and should not be overturned by this Court.

II

THE DISTRICT COURT PROPERLY REFUSED TO ALLOW TESTIMONY CONCERNING THE COST OF REPLACING THE STRUCTURES ON THE SUBJECT PROPERTY

When Mr. Clarence Marshall took the stand on behalf of the appellants, government counsel objected to Mr. Marshall giving his opinion as to the cost of replacing the structures on the property subject to the taking herein (Tr. 317). The basis of the objection was that the replacement cost less depreciation method of valuation should be used only where no fair market value for the property could be established by reference to recent sales of comparable properties.

The district court distinguished the present situation from that where replacement cost is used to evaluate business or church property (Tr. 317), to rebut testimony (Tr. 318, 337-338), to test expert opinion (Tr. 320), and to show unique value (Tr. 339-342). Having reviewed the rules of several circuits (Tr. 330-334), the court ruled that the proffered testimony was inadmissible (Tr. 343, 346), allowing appellants to make an offer of proof (Tr. 346-348).

Replacement or reproduction cost less depreciation is one of the least reliable indicia of market value. United States v. Certain Interests in Champaign County, Illinois, 271

F.2d 379, 382 (C.A. 7, 1959), cert. den., 362 U.S. 974. At best, such method of valuation merely establishes a ceiling price or "upper limit beyond which a fair appraisal cannot ordinarily go." 2 Orgel, Valuation Under Eminent Domain (2d ed. 1953) sec. 188, pp. 3-4. Such testimony is generally of little or no probative value when comparable sales are available. United States v. Miller, 317 U.S. 369, 374-375 (1943). It assumes greater significance where there are insufficient sales from which to find fair market value, United States v. Benning Housing Corporation, 276 F.2d 248, 251 (C.A. 5, 1960), where the available sales are not comparable, United States v. Baker, 279 F.2d 603, 605 (C.A. 9, 1960), or where sales of the type of property are rare. United States v. Certain Property in the Borough of Manhattan, 344 F.2d 142, 151 (C.A. 2, 1965).

The district court recognized that replacement cost less depreciation was an acceptable substitute for comparable sales in certain cases. But it clearly and correctly distinguished the instant case from one in which this secondary method of finding market value would be appropriate. Furthermore, the court had before it considerable evidence of comparable sales. It obviously felt that a replacement cost approach would not be relevant under the circumstances. In this it was

correct. Such decision on its part was manifestly within the court's wide discretion to accept or reject evidence of value, as we discussed above, whether such be sales or other types of evidence of value. And the case against the use of the replacement cost method is even stronger when, as herein, it was to be used as direct proof of value, not as background for an expert's opinion. Fairfield Gardens, Inc. v. United States, 306 F.2d 167, 174 (C.A. 9, 1962); United States v. Johnson, 285 F.2d 35, 39 (C.A. 9, 1960); Carlstrom v. United States, 275 F.2d 802, 808 (C.A. 9, 1960).

The record and the transcript reflect a judicious exercise of discretion by the district court and such exercise should not be disturbed on appeal.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed and the decision below affirmed.

Respectfully submitted,

CLYDE O. MARTZ,
Assistant Attorney General.

SMITHMOORE P. MYERS,
United States Attorney,
Spokane, Washington 99210.

RONALD R. HULL,
Assistant United States Attorney,
Yakima, Washington 98901.

ROGER P. MARQUIS,
ROBERT S. LYNCH,
Attorneys, Department of Justice,
Washington, D. C. 20530.

OCTOBER 1968

No. 22368

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM J. FOX, JR., ET AL., Appellants

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

REPLY BRIEF OF APPELLANTS FOX

KENNETH C. HAWKINS,
Attorney for Appellants
419 Miller Building
P. O. Box 541
Yakima, Washington 98901

FILED

INDEX

		Page
I.	THE FLOYD TO FOX SALE	1
II.	REPRODUCTION COST OF STRUCTURES	5

TABLE OF CASES

Albert Hanson Lumber Company v. U. S., 261 U. S. 581, 67 Law Ed. 809, 43 Sup. Ct. 442 5
Appleton Water Works Co., v. Railroad Commission, 154 Wis. 121; 142 N.W. 476 . . 5
Bartlett v. Medford, 252 Mass. 311, 147 N.E. 739 2
Burchell v. Commonwealth, 215 N.E. (2d) 649 4
Commonwealth v. Goehring, 408 S.W. (2d) 636 4
Forest Preserve District v. Barcher, 293 Ill 556, 127 N. E. 878 2
Fourth National Bank v. Boston and the Commonwealth, 212 Mass. 66, 98 N.E. 686 . . 2
Gloucester Water Supply Company v. Gloucester, 179 Mass. 365, 60 N.E. 977 5
North Carolina v. Privett, 246 N.C. 501, 99 S. E. (2d) 61 6
Ranck v. Cedar Rapids, 134 Iowa 563, 111 N.W. 1027 5
Sheehy v. Inhabitants of Weymouth, 266 Mass. 165, 164 N.E. 819 2
Standard Oil Company v. Southern Pacific Company, 268 U. S. 146, 69 Law Ed. 890, 45 Sup. Ct. 465 5
State v. Redwing Laundry and Drycleaning Company, 253 Minn. 570, 93 N.W. (2d) 206; 44 Minn. Law Review, 162 5
U. S. v. Benning Housing Corp., (Ca. 5) 276 F. (2d) 248 5
U. S. v. Certain Parcels of Land, 144 F. (2d) 626, (Ca. 3) 2
U. S. v. City of New York, 165 F. (2d) 526 . . . 5
U. S. v. 63 Acres, 245 F. (2d) 140 3

OTHER CITATIONS

1 Orgel on Valuations, § 136 1
2 Orgel on Valuation, Eminent Domain, 2d Ed., 1953, pp. 3,4, and 9 5
172 A.L.R. 244 6

No. 22368

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM J. FOX, JR., ET AL., Appellants

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

REPLY BRIEF OF APPELLANTS FOX

REPLY TO ARGUMENT OF RESPONDENT
I.

THE FLOYD TO FOX SALE

The respondent, commencing on page six sets forth his argument to support the proposition that the District Court properly exercised its discretion in excluding the Floyd to Fox sale.

The place of comparable sales in condemnation actions once a matter of some controversy, is now settled. Comparable sales are admissible as they are of real value to the trier of the fact in determining the fair market value of the subject property; that is, the fair market value of the property taken or affected by the instant condemnation proceeding. 1 Orgel on Valuations, §136, et seq.

The rule admitting comparable sales is often called the Massachusetts rule. The rule rejecting comparable sales as introducing collateral issues and inflicting too much surprise upon opposing counsel and as constituting hearsay, is the Pennsylvania rule. This rule was developed in Nebraska, New York, and Pennsylvania. However, virtually all courts have now rejected this minority rule and have adopted the Pennsylvania rule. Many of the rules restricting comparable sales stem from the early development of the minority rule.

Counsel first contends that comparable sales, to be admissib[le] must have been sales for cash or its equivalent. This, however, is no longer the law, if it ever was the law. See Bartlett v. Medford, 252 Mass. 311, 147 N.E. 739 where the court said:

> "The fact that the price for the property was paid in large part by mortgages did not affect the competency of the testimony, provided the sale was a genuine one."

To the same effect see Sheehy v. Inhabitants of Weymouth, 266 Mass. 165, 164 N.E. 819; Fourth National Bank v. Boston and the Commonwealth, 212 Mass. 66, 98 N.E. 686; Forest Preserve District v. Barcher, 293 Ill. 556, 127 N.E. 878; United States v. Certain Parcels of Land, 144 F. (2d) 626, (Ca. 3). The first point made by respondent is therefore without merit.

Next, counsel contends on pages 8 and 9 of his brief that in any event the broad discretion of the District Court justifies the exclusion. However, failure to admit a comparable sale is a violation of the majority rule

above referred to unless there is some element that indicates that the rule is legally insufficient; i.e., that there was some coercion so that either the buyer was not acting freely or the seller not acting freely. Such however, was not the case here.

Counsel urges that the discretion was justified by virtue of the fact that the property sold was in the general vicinity of the freeway. However, Mr. Fox testified that he bought the property in order to utilize it it as his base of operations for the house moving business he had operated on the subject property. He had explained that the freeway had nothing to do with his selection as the Highway Department did not permit him or others to move houses on the freeway, and that its existance was actually a hindrance to him. That he had searched all over the Valley and could find nothing on U. S. 97 or elsewhere that would serve the purpose that was as cheap as he could buy the Floyd property. Under these circumstances the court should have admitted the testimony. The weight of it was for the jury. See U. S. v. 63 Acres, 245 F. (2d) 140, where the court said at page 144:

> "There is no absolute rule which precludes the consideration of subsequent sales. The general rule is that evidence of "similar sales in the vicinity made at or about the same time" is to be the basis for the valuation and evidence of all such sales should generally be made admissible. United States v. 5139.5 Acres of Land, etc., 4 Cir., 1952, 200 F. 2d 659, 662; 1 Orgel, Valuation Under Eminent Domain, § 139 (2d Ed. 1953), including subsequent sales. Cf. People ex rel. Horowitz v. Mitter, 1st Dept. 1944, 267 App. Div. 897, 47 N.Y.S. 2d 168; People ex rel. Four Park Ave. Corp. v. Lilly, 1st Dept. 1942, 265 App. Div. 68, 37 N.Y.S. 2d 733,

737-738. The generality of this rule is limited, however, by the consideration that a condemnation itself may increase prices and the government should not have to pay for such artificially inflated values. See International Paper Co. v. United States, 5 Cir., 1955, 227 F. 2d 201. But that possibility does not produce a hard and fast exclusionary rule. In every case it is a question of judgment as to the extent of this danger and, particularly where a judge is sitting without a jury, it would seem the better practice to admit the evidence and then to weigh it having due regard for the danger of artificial inflation.

"In this case the importance of the evidence far outweighs any possible danger of its representing artificially inflated values for as noted, evidence of the September sale is crucial to the basic issue of whether rezoning of the area south of the Boulevard also raised values on the northern property. We therefore hold that it was an abuse of discretion not to admit and consider the evidence of the sale of government property north of the Boulevard in September on the issue of the value of the defendants' property, and reverse and remand for a new trial."

See also Burchell v. Commonwealth, 215 N.E. (2d) 649, (Mass. 1966)

See also Commonwealth v. Goehring, 408 S.W. (2d) 636 (Ky. 1966)

where the Court said on page 638:

"Since there may be a new trial we make two observations: (a) If the remainder of this farm was sold within a reasonable time after this taking, its sale price is admissible as a comparable sale unless lack of comparability is established. Commonwealth, Department of Highways v. Gibson, Ky., 401 S. W. (2d) 71; (b) the instructions in Commonwealth, Department of Highways v. Priest, Ky., 387 S.W. 2d 302, should be submitted to the jury. We find the other ground of alleged error to be without merit.

"The judgment is reversed with directions to grant a new trial."

Clearly, the Floyd to Fox sale should have been admitted.

REPRODUCTION COST OF STRUCTURES

Counsel evidently concedes that this evidence was admissible. He says, on page 13:

> "Replacement or reproduction cost less depreciation is one of the least reliable inditia of market value."

Nevertheless, even though it may not be conclusive, it is an important help to the trier of fact. This is particularly true in the situation where the property is being used for its highest and best use and the buildings were built for and are adaptable for that specific purpose. It hardly seems possible that such reproduction costs less depreciation is excludable. See United States v. City of New York, 165 F. (2d) 526. Counsel cites 2 Orgel, Valuation under Eminent Domain, 2nd Edition, 1953, pages 3 and 4. However, on page 9 this authority concludes as follows:

> "It is now the prevailing rule that estimates of reproduction cost may be introduced on direct examination whenever the buildings are well adapted to the land on which they stand."

See also Standard Oil Company v. Southern Pacific Company, 268 U. S. 146, 69 Law. Ed. 890; 45 Sup. Ct. 465; Albert Hanson Lumber Company v. U. S., 261 U. S. 581, 67 Law Ed. 809, 43 Sup. Ct. 442; United States v. Benning Housing Corporation, (Ca. 5) 276 F. (2d) 248; Ranck v. Cedar Rapids, 134 Iowa 563, 111 N. W.1027; Gloucester Water Supply Company vs. Gloucester, 179 Mass. 365, 60 N. E. 977; Appleton Water Works Co., v. Railroad Commission, 154 Wis. 121; 142 N. W. 476; State v. Redwing Laundry and Drycleaning Company,

253 Minn. 570; 93 N. W. (2d) 206; 44 Minn. Law Review, 162; North Carolina v. Privett, 246 N. C. 501, 99 S. E. (2d) 61; 172 A.L.R. 244.

When there was no property with comparable improvements that were established as comparable sales, it seems hard to justify the exclusion of reproduction cost less depreciation in the situation where we are dealing with property which has been improved by improvements that were built for and actually used and in use for even the highest and best use testified to by the appraisers for the Government.

It is respectfully submitted that the trial court was in error and that a new trial court should be granted as prayed for in appellant's opening brief.

Respectfully submitted,

KENNETH C. HAWKINS,
Attorney for Appellants Fox

NO. 22371

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE DOBBINS, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
CRAIG B. JORGENSEN
Assistant U. S. Attorney

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee
United States of America

FILED
MAY 9 1968
WM. B. LUCK, CLERK

NO. 22371

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE DOBBINS, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
CRAIG B. JORGENSEN
Assistant U. S. Attorney

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee
United States of America

TOPICAL INDEX

		Page
Table of Authorities		ii
I	JURISDICTIONAL STATEMENT	1
II	STATEMENT OF THE CASE	2
III	STATUTE INVOLVED	3
IV	STATEMENT OF FACTS	3
V	QUESTIONS PRESENTED	4
VI	ARGUMENT	4
	A. THE DIAGRAM WAS PROPERLY ADMITTED	4
	B. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT.	5
VII	CONCLUSION	6
CERTIFICATE		7

TABLE OF AUTHORITIES

Cases	Page
Elder v. United States, 213 F.2d 876 (5th Cir. 1954), cert. denied 348 U.S. 901 (1954)	5
Glasser v. United States, 315 U.S. 60 (1942)	5
Ingram v. United States, 360 U.S. 672 (1959)	6
Noto v. United States, 367 U.S. 290 (1961)	5, 6
Stoppelli v. United States, 183 F.2d 391 (9th Cir. 1950), cert. denied 340 U.S. 864 (1950)	6
United States v. Mortimer, 118 F.2d 266 (2nd Cir. 1941), cert. denied 314 U.S. 616 (1941)	5
United States v. Rosenberg, 195 F.2d 583 (2nd Cir. 1952), cert. denied 344 U.S. 838 (1952)	5

Statutes	
Title 18, United States Code, §1708	1, 3
Title 18, United States Code, §3231	1
Title 28, United States Code, §1291	1
Title 28, United States Code, §1294	1

NO. 22371

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE DOBBINS, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant Lawrence Dobbins, Jr., was indicted May 24, 1967, for a violation of Title 18, United States Code, Section 1708 [C. T. 2]. [1/] A Judgment of Conviction on Count One of the indictment was entered on June 6, 1967 [C. T. 39]. Notice of Appeal was filed June 23, 1967 [C. T. 41].

Jurisdiction of the District Court was predicated on Title 18, United States Code, Section 3231. Jurisdiction of this Court is based upon Sections 1291 and 1294 of Title 28, United States Code.

1/ "C. T." refers to Clerk's Transcript.

II

STATEMENT OF THE CASE

Appellant was charged in Count One of the indictment with the theft from a post office of a letter addressed to the Hebrew Evangelization Society, Inc., P. O. Box 707, L. A. Calif. bearing the return address of D. Y. Horsley, 232 Milton, Colombia, Illinois 62236 [C. T. 2].

Counts Two and Three were dismissed by the trial court following the government's election to proceed on Count One only. The trial court previously had granted appellant's motion to require an election by the government [R. T. 158-9]. 2/

Defendant was arraigned on June 1, 1967; he entered a plea of not guilty [R. T. 7-8]. Trial by jury commenced on June 1, 1967, before the Honorable Charles H. Carr, United States District Judge [R. T. 9]. After the jury was unable to reach a verdict, a mistrial was declared [R. T. 241]. A second jury was impanelled and trial commenced June 7, 1967, before the Honorable Charles H. Carr [R. T. 252]. A verdict of guilty was returned on June 8, 1967 [R. T. 415]. Judgment of conviction was entered on June 19, 1967 [C T. 39]. Notice of Appeal was filed June 23, 1967 [R. T. 41].

2/ "R. T." refers to Reporter's Transcript.

III

STATUTE INVOLVED

Title 18, United States Code, Section 1708 provides:

> "Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts to obtain, from out of any mail, post office, letter box, mail receptacle, . . . or other authorized depository for mail matter . . . any letter, . . . package, bag . . . Shall be fined not more than $2,000.00 or imprisoned not more than five years, or both."

IV

STATEMENT OF FACTS

Appellant Lawrence Dobbins, Jr., was a postal employee on March 22, 1967 [R. T. 270]. On that date, he appeared at the Terminal Annex, United States Post Office, but did not report for duty [R. T. 270]. At approximately 7:18 P. M. on March 22, 1967 [R. T. 311], prior to appellant's scheduled time for reporting to work [R. T. 276], appellant, contrary to instructions [R. T. 303-5], went to a mail sorting area of the post office [R. T. 311]. He rummaged through several trays of mail [R. T. 311] before extracting three letters [R. T. 312, 335-6] containing money [R. T. 366] which he then secreted in his pocket [R. T. 312-3, 335-7]. Shortly thereafter, appellant was confronted by a postal inspector and an investigative aid [R. T. 314, 336], at which time appellant forcibly

placed the letters into another tray of mail [R. T. 314-5, 336-7].

Defendant testified that he took the letters to embarrass the inspectors, but that he did not intend to steal them [R. T. 348].

V

QUESTIONS PRESENTED

1. Was it plain error to admit a diagram of the post office area into evidence?

2. Is the evidence sufficient to support the verdict?

VI

ARGUMENT

A. THE DIAGRAM WAS PROPERLY ADMITTED

A diagram of the area where the offense occurred was admitted into evidence without objection [R. T. 282]. An adequate foundation for the admission of the diagram was laid through the testimony of John Sloan, a general foreman with the United States post office [R. T. 281]. Counsel for the appellant had seen the diagram [R. T. 279] and expressly stated that he had no objection to its admission [R T. 282].

Illustrative diagrams or charts are admissible when properly identified.

United States v. Rosenberg, 195 F. 2d 583 (2d Cir. 1952), cert. denied, 344 U. S. 838 (1952);

United States v. Mortimer, 118 F. 2d 266 (2d Cir. 1941), cert. denied, 314 U. S. 616 (1941).

Any error in the admission of the chart would be harmless under the circumstances of this case in any event.

See Elder v. United States, 213 F 2d 876 (5th Cir. 1954), cert. denied, 348 U. S. 901 (1954).

B. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT.

The jury could infer that appellant intended to steal from the following facts:

(1) Appellant, against his instructions, was in a work area before he punched in for work [R. T. 276, 303-5, 311].

(2) Appellant, against his instructions, took letters and secreted them in his pocket [R. T. 303-5, 312-3, 335-6].

(3) Upon being confronted by the postal authorities, appellant attempted to dispose of the letters [R. T. 314-5, 336-7].

When considering the sufficiency of the evidence, an appellate court must view the evidence taken at trial in the light most favorable to the Government, together with all reasonable inferences which may be drawn therefrom. Noto v. United States, 367 U.S. 290 (1961); Glasser v. United States, 315 U.S. 60 (1942).

If the court then finds substantial evidence, it must presume

the findings of the trier of fact to be correct, and the judgment must be sustained. Noto v. United States, supra; Ingram v. United States, 360 U.S. 672, 678 (1959).

The credibility of witnesses and the weight to be given their testimony is a matter within the province of the trier of fact. Stoppelli v. United States, 183 F.2d 391 (9th Cir. 1950), cert. denied, 340 U.S. 864 (1950).

The record before this Court discloses more than substantial evidence to support the verdict.

VII

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

CRAIG B. JORGENSEN,
Assistant U. S. Attorney.

Attorneys for Appellee
United States of America

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Craig B. Jorgensen

CRAIG B. JORGENSEN

22376

No. 22,378 6

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

FOOD EMPLOYERS COUNCIL, INC.,
and RETAIL CLERKS UNION, LOCAL 770,

Respondents.

On Petition
for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
FRANK H. ITKIN,
IAN D. LANOFF,
Attorneys,
National Labor Relations Board.

FILED
FEB 16 1968
WM. B. LUCK, CLERK
FEB 23 1968

INDEX

	Page
JURISDICTION	1
STATEMENT OF THE CASE	2
I. The Board's Findings of Fact	2
A. Background: the prior efforts of the Retail Clerks to represent the snackbar employees	3
B. The extension by the Council and the Retail Clerks of their 1964-69 contract to unrepresented snackbar employees	6
II. The Board's Conclusions and Order	7
ARGUMENT:	
The Board properly found that respondent Council and respondent Retail Clerks violated Sections 8(a)(1), (2) and (3) and 8(b)(1)(A) and (2) of the Act, respectively, by applying the terms and conditions of their 1964-69 collective bargaining agreement to the Employer's snackbar employees	10
A. The Board properly concluded that the snackbar employees were not an accretion to the existing unit of retail clerks	12
B. The violation found here is not contingent upon a showing that the Culinary Workers Union has made a rival claim to represent the snackbar employees	16
CONCLUSION	17

Page

CERTIFICATE 17

APPENDIX A A-1

APPENDIX B B-1

AUTHORITIES CITED

Cases:

Borg-Warner Corp., 113 NLRB 152, enf'd sub nom. *Int'l Union, United Auto, Aircraft & Agricultural Implement Workers of America v. N.L.R.B.,* 231 F.2d 237 (C.A. 7), *cert. den.,* 352 U.S. 908 . . . . 10-11, 13

Boy's Market, Inc., 156 NLRB 105, aff'd sub nom. *Retail Clerks Union v. N.L.R.B.,* 370 F.2d 205 (C.A. 9) 4

Dura Corp., 153 NLRB 592, enf'd sub nom. *Local 620, Allied Industrial Workers v. N.L.R.B.,* 375 F.2d 707 (C.A. 6) 11

Foreman & Clark, Inc. v. N.L.R.B., 215 F.2d 396 (C.A. 9), *cert. den.,* 348 U.S. 887 12

The Great A. & P. Tea Co., 140 NLRB 1011 15

Int'l Ladies Garment Workers Union v. N.L.R.B., 280 F.2d 616 (C.A.D.C.), aff'd, 366 U.S. 731 16

Int'l Ladies Garment Workers Union v. N.L.R.B., 366 U.S. 731 10

Local 620, Allied Industrial Workers of America v. N.L.R.B., 375 F.2d 707 (C.A. 6) 10, 12, 13, 15

Local Lodge No. 1424, I.A.M. v. N.L.R.B., 362 U.S. 411 . . . . 10, 13

Page

Midwest Piping & Supply Co.,
63 NLRB 1060 16

N.L.R.B. v. B. H. Hadley, Inc.,
322 F.2d 281 (C.A. 9) 12

N.L.R.B. v. Masters-Lake Success, Inc.,
287 F.2d 35 (C.A. 2) 10, 11

N.L.R.B. v. Revere Metal Art Co.,
280 F.2d 96 (C.A. 2), *cert. den.*, 364 U.S. 894 10

Packard Motor Car Co. v. N.L.R.B.,
330 U.S. 485 12

Piggly-Wiggly Calif. Co.,
144 NLRB 708 (Bd. Case No. 21-RC-8355,
Sept. 19, 1963) 4, 15

Retail Clerks Union, Local 770 v. N.L.R.B.,
370 F.2d 205 (C.A. 9) 10, 16

Statute:

National Labor Relations Act, as amended (61 Stat. 136,
73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*) 1-2

Section 7 8
Section 8(a)(1) 3, 10
Section 8(a)(2) 3, 10
Section 8(a)(3) 3, 10
Section 8(b)(1)(A) 3, 10
Section 8(b)(2) 3, 10
Section 10(e) 1

nited States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22,378

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

FOOD EMPLOYERS COUNCIL, INC.,
and RETAIL CLERKS UNION, LOCAL 770,

Respondents.

On Petition
for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136,

73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*),[1] for enforcement of its order (R. 62-65, 28-41),[2] issued on March 15, 1967, against respondents Food Employers Council, Inc. and Retail Clerks Union, Local 770 (herein, "the Council" and "Retail Clerks," respectively). The Board's decision and order are reported at 163 NLRB No. 58. This Court has jurisdiction, the unfair labor practices having occurred within this judicial circuit. No jurisdictional issue is presented.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Respondent Council, since about 1941, has negotiated for its employer-members master collective bargaining agreements with various labor organizations, including respondent Retail Clerks (R. 29; 9, 18, 23). The seven employer-members of the Council involved in this proceeding[3] operate retail food markets in Southern California, and are parties to the

---

[1] Pertinent statutory provisions are reprinted *infra*, pp. B 1-3, as Appendix B.

[2] References to the pleadings, reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript of the hearing, reproduced pursuant to Rules 10 and 17 of this Court as "Volume II, Transcript of Record," are designated "Tr." References to the General Counsel's exhibits are designated "G.C. Exh." References preceding a semicolon are to the Board's findings: those following are to the supporting evidence.

[3] Thriftimart, Inc.; Great A. & P. Co.: Crawford Stores; Lucky Stores, Inc.: Hughes Markets; Von's Grocery Co.; and Safeway Stores, Inc. (R. 29-30; 9-10, 18, 23, Tr. 27).

current collective bargaining contract entered into on their behalf by the Council with the Retail Clerks, effective for a five-year term from April 1, 1964 through March 31, 1969 (R. 29, 31; 9-11, 18, 23). The Board found that the Council and Retail Clerks violated Section 8(a)(1), (2) and (3) and Section 8(b)(1)(A) and (2) of the Act, respectively, by applying the terms of this contract — containing a union-security clause — to snackbar employees of the employer-members at a time when the Retail Clerks did not represent a majority of such employees (R. 31-33, 63). The essentially undisputed evidence upon which the Board based its findings is summarized below.

A. Background: the prior efforts of the Retail Clerks to represent the snackbar employees

This proceeding arises as a result of a continuing dispute between the Retail Clerks and the Culinary Workers Union[4] over the right to represent snackbar employees of the Council's employer-members (R. 31, 58-59). During the term of a prior collective bargaining agreement between the Retail Clerks and the Council (effective from January 1, 1959 until March 31, 1964), several of respondent Council's employer-members established snackbars in their stores; the 1959-1964 agreement did not cover snackbar employees (R. 31; 58, G.C. Exh. 2, Tr. 71, 128-129). On May 15, 1963, the Culinary Workers Union filed a petition with the Board seeking to

---

[4] Los Angeles Joint Executive Board of Hotel and Restaurant Employees and Bartenders Union, AFL-CIO; and Hotel, Motel, Restaurant Employees and Bartenders Union, Local 694, AFL-CIO (the charging parties before the Board in this proceeding).

represent a single unit of snackbar employees at one of two retail supermarkets of an individual employer-member of the Council. (*Piggly Wiggly California Company,* 144 NLRB 708 (Board Case No. 21-RC-8355, September 19, 1963).) The Retail Clerks intervened in that proceeding, and contended, *inter alia,* that the snackbar employees "because of mutuality of interest * * * are properly a part of, and should be included in, the grocery and produce clerks' unit" covered by its contract. The Board, in rejecting this contention, held that the 1959-1964 contract between the Clerks and the Council was not a bar to the petition of the Culinary Workers Union, and found the single store unit of snackbar employees appropriate. The Board pertinently stated (*supra,* 144 NLRB at 711):

> * * * it is clear that the snackbar employees have terms and conditions of employment not shared by, and different from, the grocery and produce clerks. The Board, in the past, has found such employees to have a community of interest apart from grocery and produce clerks and to constitute a separate appropriate unit. [footnote omitted.]

Thereafter, in another proceeding emanating from the rival efforts of the Retail Clerks and Culinary Workers Union to represent the snackbar employees (*Boy's Market, Inc.,* 156 NLRB 105, affirmed *sub nom. Retail Clerks Union v. N.L.R.B.*, 370 F. 2d 205 (C.A. 9)), the Retail Clerks charged that the Council and certain of the employer-members violated Sections 8(a)(1), (2) and (3) of the Act, by extending recognition to the Culinary Workers Union as representative of snackbar employees. This Court, in sustaining the Board's dismissal of these allegations, pertinently stated as follows (*supra,* 370 F. 2d at 208):

> * * * The "snackbar take-out food employees" [at the employer-members' stores involved] were not covered by the Retail Clerks agreement which expired March 31, 1964, and during the 1963 negotiations between the employers and the Retail Clerks, such employees were unorganized and unrepresented. Retail Clerks attempted to organize them from the top by negotiating and concluding a new agreement which in terms covered the "snackbar take-out food employees" without deference to the employees' choice of bargaining representative. The new agreement [*i.e.*, the 1964-1969 contract] excepted "persons presently under a collective bargaining agreement with the Culinary Workers Union" (Joint Board). In the meantime, the Joint Board obtained membership application cards of the "snackbar take-out food employees" in Von's four stores and in Boy's four stores * * *, and the Joint Board entered into a collective bargaining agreement covering these employees * * *.
>
> * * * While the Retail Clerks negotiated with the employers' representative, the Food Employer's Council, Inc., for representation of the unorganized snackbar take-out food employees, the Joint Board did the spade work and obtained evidence of representation and concluded its own agreement with the employers * * * .

The Court, in agreement with the Board that the employer-members did not thereby violate the Act, concluded (*ibid*):

> * * * The rights * * * to self-organization and to bargain collectively through representatives of their

own choosing granted by Section 7 of the Act are the rights of the employees, not of any labor union or the employer, and no labor organization has authority to arrogate unto itself the representation of any unrepresented group of employees without their consent.

B. The extension by the Council and the Retail Clerks of their 1964-69 contract to unrepresented snackbar employees

The current collective bargaining agreement between the Council and the Retail Clerks – effective from April 1, 1964 until March 31, 1969 – covers the employer-members' retail clerks who are engaged in food, bakery, candy, and general merchandise operations. This contract, for the first time, also includes snackbar employees within the unit (R. 31; Tr. 34-35, 39-40, 47-48, 59-60, 71-72, 83-84, 89-90, 96, 115, 119, 121-122, 128-130, G.C. Exh. 3).[5] In addition, the current contract contains union-security provisions, and – as stipulated by the parties – respondents have been maintaining and enforcing these provisions and the collection of union initiation fees and dues with respect to, *inter alia,* the covered snackbar employees (R. 33; Tr. 39-40, 72-74, 110-111, 117-122; G.C. Exh. 3, p. 3, Art. II, Par. A.)

---

[5] The contract expressly excludes only those snackbar employees "presently under a collective bargaining agreement with the Culinary Workers Union, or persons employed in a complete restaurant" (R. 56, G.C. Exh. 3).

Respondent Retail Clerks Union, admittedly, did not represent a majority of the snackbar employees included in this collective bargaining agreement at the time the contract was executed (R. 31; Tr. 34-35, 39, 47, 53, 59-60, 63-65, 68-69, 71, 90, 115, 123, 128-129). On the contrary, the Culinary Workers Union represented a majority of snackbar employees at various stores of the Council's employer-members (R. 31; 47-48, 53-64, 129, *supra*, pp. 4-6).[6]

II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board, in agreement with the Trial Examiner (R. 62-65, 28-41), concluded that respondent Council and respondent Retail Clerks Union violated Sections 8(a)(1), (2) and (3) and 8(b)(1)(A) and (b)(2) of the Act, respectively, by their admitted application and enforcement of the terms of the 1964-1969 collective bargaining agreement — including union-security provisions — to the employer-members' snackbar employees not otherwise covered by a collective bargaining agreement, at a time when the Retail Clerks did not represent a majority of the employees. In reaching this conclusion, the Board rejected respondents' contention that the snackbar employees constituted an "accretion" or addition to their existing bargaining unit

[6] As stipulated before the Board (Tr. 115): "[Respondent Union] did not represent a majority of snackbar employees * * * as distinguished from the overall group of employees covered by the [1964] contract."

(R. 32; Tr. 39, 115, R. 53).[7] The Board concluded, in substance, that the snackbar employees should therefore be afforded the opportunity to determine for themselves whether they want to be represented by a bargaining agent and, if so, to choose that agent, rather than have such determinations made for them by the Council and the Retail Clerks.

The Board's order requires the Council and the Retail Clerks to cease and desist from the unfair labor practices found, and from in any like or related manner infringing upon the Section 7 rights of the employees. Respondent Council is directed to refrain from giving any force or effect to the 1964-1969 collective bargaining agreement, insofar as it has been extended to snackbar employees. Likewise, respondent Retail Clerks is directed to cease and desist from acting as the collective bargaining representative of the snackbar employees, unless and until that Union shall have been duly certified by the Board as such representative, and to refrain from seeking to enforce the agreement insofar as snackbar employees are concerned. Affirmatively, the Council is ordered to withdraw recognition from the Retail Clerks as collective bargaining representative, pursuant to the terms of the 1964-1969 agreement, to the extent that such agreement purports to cover snackbar employees of employer-members of the Council, unless and until certified by

---

[7] As shown *infra*, pp. 10-12, the Board found that the terms and conditions of employment of the snackbar employees are different from those of the retail clerks included in the unit, and the snackbar employees "have a community of interest apart from them" (R. 32).

the Board as the employees' representative.[8] In addition, the Council is further directed to notify the snackbar employees that they need not join or maintain membership in respondent Union as a condition of employment, and to post appropriate notices. The Retail Clerks Union is similarly directed to post appropriate notices at its offices and meeting halls and to provide signed notices for posting at the food markets of the employer-members of respondent Council (R. 33-41, 63-65).[9]

---

[8] The Board's order, however, does not require the Council or its members to vary or abandon any wage, hour, seniority, or other substantive feature of the employer-members' relations with snackbar or other employees which have been established in the performance of the current collective bargaining agreement, or prejudice the assertion by the snackbar employees of any rights they may have thereunder.

[9] Respondent Council has filed no answer to the Board's petition for enforcement of this order, in accordance with Rule 34(4) of the Court, and has advised the Court, by letter dated December 20, 1967, that it does not intend to participate in these proceedings.

ARGUMENT

THE BOARD PROPERLY FOUND THAT RESPONDENT COUNCIL AND RESPONDENT RETAIL CLERKS VIOLATED SECTIONS 8(a)(1), (2), AND (3) AND 8(b)(1)(A) AND (2) OF THE ACT, RESPECTIVELY, BY APPLYING THE TERMS AND CONDITIONS OF THEIR 1964-1969 COLLECTIVE BARGAINING AGREEMENT TO THE EMPLOYER'S SNACKBAR EMPLOYEES.

An employer and a union violate the Act when the union is recognized as the collective bargaining representative of employees, a majority of whom it does not represent. *International Ladies' Garment Workers Union v. N.L.R.B.*, 366 U.S. 731, 737-739; *Local Lodge 1424, I.A.M. v. N.L.R.B.*, 362 U.S. 411, 412-414; *Local 620, Allied Industrial Workers of America v. N.L.R.B.*, 375 F. 2d 707, 711 (C.A. 6); *Retail Clerks Union, Local 770 v. N.L.R.B.*, 370 F. 2d 205, 208 (C.A. 9); *N.L.R.B. v. Masters-Lake Success, Inc.*, 287 F. 2d 35 (C.A. 2); *N.L.R.B. v. Revere Metal Art Co.*, 280 F. 2d 96, 100 (C.A. 2), cert. denied, 364 U.S. 894. Under this general principle, however, an employer may recognize an incumbent representative of a unit of his employees as the representative of an additional group of employees where the new group is merely an "accretion" to the existing bargaining unit.[10] See, *Borg-Warner Corporation*, 113

---

[10] An "accretion" is, by definition, merely the addition of new employees to an already existing group. When the new employees are added and comingled with existing employees so as to lose their separate identity, their inclusion in an existing unit follows as a matter of course. Questions arise only when the new group remains identifiable, for example, as when they constitute a separate department or store or plant. In these situations, as shown hereinafter, the Board will examine the entire picture before permitting the new employees

NLRB 152, 153, enforced *sub nom. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. N.L.R.B.*, 231 F. 2d 237, 243 (C.A. 7), cert. denied, 352 U.S. 908; *Masters-Lake Success, Inc.*, 124 NLRB 580, enforced 287 F. 2d 35, 36 (C.A. 2); *Dura Corp.*, 153 NLRB 592, enforced *sub nom. Local 620, Allied Industrial Workers v. N.L.R.B.*, 375 F. 2d 707, 710-711 (C.A. 6).

In the instant case, it is undisputed that, at the time the Council and the Retail Clerks entered into their 1964-1969 collective bargaining agreement, the Retail Clerks did not represent a majority of the newly covered snackbar employees (*supra*, pp. 6 - 7). Indeed, the rival Culinary Workers Union concededly represented snackbar employees of certain employer-members of the Council, who were parties to this 1964-1969 contract (R. 31). Thus, unless the Board unreasonably refused to regard the employers' snackbar employees (not covered by a contract with the Culinary Workers Union) as an accretion to the existing retail clerks' unit, the recognition which respondent Council extended to respondent Retail Clerks violated, with respect to the Council, Section 8(a)(1) and (2), and with respect to the Retail Clerks, 8(b)(1)(A) and (2) of the Act (App. B., *infra*, pp. B 1-3). In addition, respondents, by extending the union-security provisions of their contract to these employees, further violated Section 8(a)(3) and 8(b)(2). We show

---

10 (continued)

to be swallowed up by the bargaining representative of the employer's other employees without expressing their wishes in the matter. When such inclusion is permitted, on the basis of criteria developed by the Board and approved by the courts (cases cited above), the new group is an "accretion" to the old group.

hereinafter that the Board, in rejecting respondents' contention that the snackbar employees constituted an accretion to the existing unit (R. 63, 53, 32), acted reasonably and well within the discretion accorded it in such matters.

A. The Board properly concluded that the snackbar employees were not an accretion to the existing unit of retail clerks

The Board's resolution of the "issue as to what unit is appropriate for bargaining," posed in representation proceedings under Section 9 of the Act, "involves of necessity a large measure of informed discretion and the decision of the Board, if not final, is rarely to be disturbed." *Packard Motor Car Company v. N.L.R.B.*, 330 U.S. 485, 491. A party challenging a Board unit determination "bears the burden of showing that the Board has abused its discretion." *N.L.R.B. v. Schill Steel Products, Inc.*. 340 F. 2d 568, 574 (C.A. 5); and see, *N.L.R.B. v. B. H. Hadley, Inc.*, 322 F. 2d 281, 284 (C.A. 9); *Foreman & Clark, Inc. v. N.L.R.B.*, 215 F. 2d 396, 405-406 (C.A. 9), cert. denied, 348 U.S. 887. "That this is not a representation case does not change the role of the Board. * * * Here, the question was whether the boundaries of a valid bargaining unit could be contractually extended by an employer and a union to cover employees * * * who never indicated their support of that union." *Local 620, Allied Industrial Workers v. N. L.R.B., supra,* 375 F. 2d at 711. The Board, in resolving this issue, traditionally considers such factors as "the existence of separate administrative units, the geographical distance between [the groups of employees involved], their lack of significant functional integration, the contractual differences governing the two groups of workers, the failure of any substantial interchange of employees to take place" and,

thus, whether there is "a sufficient community of interest demonstrated between" the new group of employees and the existing unit "to justify the former being represented, without their acquiescence, by the same bargaining agent." *Local 620, Allied Industrial Workers v. N.L.R.B., supra,* 375 F. 2d at 711; *N.L,R.B. v. Masters-Lake Success, Inc., supra,* 287 F. 2d at 36; *International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America v. N.L.R.B., supra,* 231 F. 2d at 243. The Board's application of these criteria to the particular facts of a case will not be disturbed on review unless its action is shown to be "arbitrary or capricious" (*ibid.*).

In the instant case, the Board applied the foregoing criteria to the essentially uncontradicted evidence, and found (R. 32):

> * * * snackbar employees are engaged in a different type of work than that performed by the retail clerks in the food markets, * * * there is no interchange between such employees, * * * the snackbars are located outside the check stands of the markets and these are physically separated from the area where the other retail clerks work; * * * the snackbar employees are under separate supervision; * * * they may not work split shifts; * * * premium rates of pay for Sunday work are not applicable to them. It is thus clear that the terms and conditions of employment of snackbar employees are different from those of the retail clerks and that they have a community of interest apart from them * * *.

The record amply supports these findings. Thus, as stipulated by the parties (R. 32; Tr. 129-130, 133), the snackbar employees prepare food which, in some cases,either is consumed at tables or counters on the premises or, in other cases, is wrapped by the employees for consumption off the premises.[11] In either case, all such purchases are paid for at the snackbar cash register, since these facilities are situated outside of the supermarkets' "check stands." There are no other employees in the supermarkets who perform this type of work, and there is no "interchange of snackbar" and other store workers.[12] Immediate authority over the snackbar operation is vested in a "department manager," who, in turn, is ultimately responsible to the store manager (Tr. 130). In addition, an examination of the respondents' current 1964-1969 collective bargaining agreement reveals differences in hours, wages and working conditions between snackbar and retail clerk employees. Thus, split shifts are permitted for snackbar employees, but prohibited for all other store workers (R.32; G.C. Exh. 3, Art. IV, Par. G 2, Art. VI, Par. S1, 2). A guarantee of 8-hours work at a Sunday premium rate of pay, applicable to all retail clerks

---

[11] In addition to their normal counter-service duties, snackbar employees must clean dishes and cooking utensils, and perform housekeeping functions attending the daily preparation and dispensing of food (Tr. 138-139).

[12] In "emergency" situations, "clerks, helpers, or box boys will relieve the snackbar employees" (Tr. 130). As the personnel manager for Hughes Supermarkets acknowledged before the Board (Tr. 148-149), these emergencies "hardly" ever arise in the employer's larger stores, and "may" occur "once in thirty days" in the smaller stores. On these rare occasions. the market employees chosen to substitute for snackbar employees must receive specialized training before performing snackbar functions (Tr. 143-144, 148). In addition, "on occasion," snackbar employees have moved to other jobs "within the store" (Tr. 130).

(except part-time clerks' helpers), is not available to snackbar personnel (R. 32; G.C. Exh. 3, Art. VI, Par. S1, 2). The current agreement further provides that future wage increases for snackbar employees shall either be the same as those negotiated for "clerks' helpers" "or those negotiated by the hotel and restaurant industry, whichever are greater" (R. 32; G.C. Exh. 3, Art. VI, Par. S1, 2). Moreover, snackbar employees are furnished meals, while other store employees are not (R. 52; G.C. Exh. 3, Art. VI, Par. S1, 2).

Under the circumstances, the Board reasonably found, as it has in the past (*Piggly-Wiggly California Company,* 144 NLRB 708, 711), "that the snackbar employees have terms and conditions of employment not shared by, and different from, the grocery and produce clerks [and, therefore,] such employees have a community of interest apart from" the existing unit of retail clerks. Accordingly, respondent Council and respondent Retail Clerks had no right to extend the terms of their collective bargaining agreement so as to deprive these employees of their right to choose freely a bargaining representative.[13]

---

[13] Before the Board (R. 59-60), respondents relied upon the Board's holding in *The Great A. & P. Tea Co.*, 140 NLRB 1011. As stated in that case (*id.* at 1021-1023): "Whether or not a particular operation constitutes an accretion or a separate unit turns, of course, on the entire congeries of facts in each case." There, the Board — in balancing "the right of employees to select a bargaining representative against the concomitant statutory objective of maintaining established stable labor relations" — found that the new department had "been physically established, operated, and administered as an integral part of the Company's food store operations and not as an autonomous and separate enterprise" (*ibid.*). The balance struck on the facts presented in that case does not render the Board's conclusion in this case "an abuse of discretion." *Local 620, Allied Industrial Workers v. N.L.R.B., supra,* 375 F. 2d at 711.

B. The violation found here is not contingent upon a showing that the Culinary Workers Union has made a rival claim to represent the snackbar employees

Respondents argued before the Board (R. 55-60) that, in order to find a violation here, their conduct must contravene the principle established in *Midwest Piping and Supply Co.*, 63 NLRB 1060. This doctrine prohibits an employer from recognizing or contracting with one of two rival union claimants at a time when their claims give rise to a real question concerning representation, and requires that a union's right to be recognized first be determined under the election procedures provided in the Act.

Respondents, in relying upon this principle, misconceive the nature of the violation found here. It is a violation of the Act, as shown *supra*, pp. 10-12, for an employer to conclude a collective bargaining agreement with a minority union regardless of the presence of rival union claims. See, *International Ladies' Garment Workers' Union v. N.L.R.B.*, 280 F. 2d 616, 620, aff'd, 366 U.S. 731; *Retail Clerks Union, Local 770 v. N.L.R.B., supra*, 370 F. 2d at 207-208. Indeed, as this Court recently stated in *Retail Clerks Union, Local 770, supra*, at 208, "* * * no labor organization has authority to arrogate unto itself the representation of any unrepresented group of employees without their consent." The Section 7 rights of employees "to bargain collectively through representatives of their own choosing" or "to refrain from any or all such activities" are not contingent upon rival claims made by competing unions.

CONCLUSION

Accordingly, it is respectfully submitted that the Board's order should be enforced in full.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

FRANK H. ITKIN,
IAN D. LANOFF,
Attorneys,

National Labor Relations Board.

February 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

APPENDIX A

Table of Exhibits Presented Pursuant to Rule 18(f) of the Rules of this Court

(Numbers are to pages of reporter's typewritten transcript)

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1 (a) through (g)	6	6	6
2	44	44	44
3	45	45	47

RESPONDENTS' EXHIBITS

No.	Identified	Offered	Received in Evidence
1	185	196	196
2	213	216	216

CHARGING PARTIES' EXHIBITS

No.	Identified	Offered	Received in Evidence
1 (a) through (c)	157	172	173

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat 519, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteeed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided:* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further:* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

CASILLAS PRESS, INC.
1000 Connecticut Avenue Building
1717 K Street, N. W.
Washington, D. C. 20006
223-1220

No. 22,376

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

National Labor Relations Board,

Petitioner,

vs.

Food Employers Council, Inc., and Retail Clerks Union, Local 770,

Respondents.

Petition for Enforcement and Cross-Petition for Review of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT UNION, RETAIL CLERKS UNION, LOCAL 770.

Arnold, Smith & Schwartz,
Kenneth M. Schwartz,
Laurence D. Steinsapir,
Jack M. Newman,

6404 Wilshire Boulevard,
Suite 950,
Los Angeles, Calif. 90048,

Attorneys for Respondent, Retail Clerks Union, Local 770.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

	Page
Jurisdiction	1
Counterstatement of the Case	2
Argument	3
The Board Improperly Found That Respondent Counsel and Respondent Union Violated Sections 8(a)(1), (2) and (3) and 8(b)(1)(A) and (2) of the Act, Respectively, by Applying the Terms and Conditions of Their 1964-1969 Collective Bargaining Agreement to the Employer's Snack Bar Employees	3
Conclusion	16
Appendix A. Section 9(c) National Labor Relations Act	App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Beaumont Forging Co., 110 NLRB 2200	4, 5
Boys Markets, Inc., 156 NLRB No. 6	5, 15
Dixie Belle Mills, Inc., 139 NLRB 629	5
Fredrickson Motor Express Corp., 121 NLRB 32	5
Foreman & Clark, Inc. v. NLRB, 215 F. 2d 396, cert. den. 348 U.S. 887	5
Harris Langenberg & Co. v. NLRB, 216 F. 2d 146	5
International Ladies' Garment Workers' Union v. NLRB, 280 F. 2d 616, aff. 366 U.S. 731	16
J. W. Mays, Inc., 147 NLRB 968	4
Liebmann Breweries, Inc., 142 NLRB 121	5
Local 620, Allied Industrial Workers v. NLRB, 375 F. 2d 707, 64 LRRM 2828	11
May Department Stores Co., Kaufmann Div., 97 NLRB 1007	4
Mountain States Telephone & Telegraph Co. v. NLRB, 310 F. 2d 478, cert. den. 371 U.S. 875	5
Mueller Brass Co. v. NLRB, 180 F. 2d 402	5
NLRB v. Charles Smyth, et al., 212 F. 2d 664	5
NLRB v. Illinois Malleable Iron Co., 296 F. 2d 202, 49 LRRM 2103	12, 15, 16
NLRB v. Quaker City Life Insurance Co., 319 F. 2d 690	5
NLRB v. Schill Steel Products, 340 F. 2d 568	5
NLRB v. Smith, 209 F. 2d 905	5
Piggly-Wiggly California Co., 144 NLRB 708	3, 15
Polk Bros., Inc., 128 NLRB 330	4

Page

Priced Less Discount Foods, Inc., 157 NLRB, No. 95 11

Safeway Stores, Inc. and Local 37, Bakery and Confectionary Workers International Union of America, 137 NLRB, No. 187, 50 LRRM 1481 .... 9, 10, 11

Sav-On Drugs, Inc., 138 NLRB 1032 5

Stern's Paramus, 150 NLRB 799 4

Teamsters Local v. NLRB, 365 U.S. 667, 47 LRRM 2906 16

Temco Aircraft Corp., 121 NLRB 1085 5

The Great A & P Tea Co., 140 NLRB 1011 11

Statutes

National Labor Relations Act, Sec. 8(a)(1) 3

National Labor Relations Act, Sec. 8(a)(2) 3

National Labor Relations Act, Sec. 8(b)(1)(A) 3

National Labor Relations Act, Sec. 8(b)(2)(A) 3

National Labor Relations Act, Sec. 9 4

National Labor Relations Act, Sec. 9(c) 12

National Labor Relations Act, Sec. 10(e) 1

National Labor Relations Act, Sec. 10(f) 1

61 Statutes at Large, p. 136 1

73 Statutes at Large, p. 519 1

United States Code, Title 29, Sec. 151 1

No. 22,376

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

FOOD EMPLOYERS COUNCIL, INC. and RETAIL CLERKS UNION, LOCAL 770,

Respondents.

Petition for Enforcement and Cross-Petition for Review of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT UNION, RETAIL CLERKS UNION, LOCAL 770.

Jurisdiction.

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Section 151, *et seq.*), for enforcement of its order, issued on March 15, 1967, and cross-application for review of such order, pursuant to Section 10(f) of the National Labor Relations Act, as amended, against respondents, Food Employers Council, Inc., and Retail Clerks Union, Local 770. The Board's Decision and

Order are reported at 163 NLRB, No. 58. This Court has jurisdiction, in that the alleged unfair labor practices occurred within this judicial circuit. No jurisdictional issue is presented.

Counterstatement of the Case.

Respondent Union incorporates herein as if fully set forth petitioner's Statement of the Case, with the exception of that portion which relates to the extension by the Food Employers Council and respondent Union of their 1964-69 contract to snack bar employees. At the time the contract was executed, respondent Union represented a majority of employees in the appropriate unit, which included snack bar employees. Respondent Union has at no time distinguished between snack bar employees and other employees included within its bargaining unit, with the exceptions noted in G.C. Ex. 3, *i.e.*, those employees represented by other Unions [Tr. 90, 94, 115].

ARGUMENT.

The Board Improperly Found That Respondent Counsel and Respondent Union Violated Sections 8(a)(1), (2) and (3) and 8(b)(1)(A) and (2) of the Act, Respectively, by Applying the Terms and Conditions of Their 1964-1969 Collective Bargaining Agreement to the Employer's Snack Bar Employees.

Respondent Union urges that the Board unreasonably refused to regard the Employer's snack bar employees (not covered by a contract with the Culinary Workers Union) as an accretion to the existing Retail Clerks' unit, and therefore, that the extension of recognition by respondent Council to the Retail Clerks did not violate Sections 8(a)(1) and (2), with respect to the Council and 8(b)(1)(A) and (2) of the Act, with respect to the Union.

The Board exceeded its authority and abused its discretion by its finding that, upon the application of the relevant criteria, the Employers' snack bar employees are not properly an accretion to the Clerks' bargaining unit, in that the terms and conditions of their employment are different from those of the Retail Clerks and that they have a community of interest apart from them.

Contrary to the contention of the Board, these findings are not supported by the record. The Board cites the *Piggly-Wiggly California Co.* case, 144 NLRB 708, in support of this assertion. However, that case pertained to a set of facts wholly different from those of the instant case, and is therefore, inapposite with regard to the issues in the case presently before this Court. In the *Piggly-Wiggly* case, the petitioner, Culinary Workers, Local 694, sought to represent a unit

composed of the snack bar employees of the Encino store of the Employer. The Retail Clerks, intervenor therein, asserted that its then current contract with the multi-employer bargaining unit covered snack bar employees of Piggly-Wiggly and all other members of the multi-employer unit; and in the alternative, that the unit sought by the Culinary Workers was inappropriate in that it ought to be co-extensive with the Employers' two stores, if not the entire multi-employer unit, and, because of a mutuality of interest, the snack bar employees were properly part of the Retail Clerks' unit.

The Board found that there was no intention that the contract between the Retail Clerks and the Food Employers' Council cover snack bar employees, and thus, there was no history of overall bargaining for snack bar employees on a multi-employer basis. Therefore, on the basis of the evidence presented, the single store unit of snack bar employees was found to be appropriate.

However, in circumstances where no labor organization seeks to represent such a unit separately, a store-wide unit may constitute an appropriate unit in conformance with long-established Board policy. Such policy, as applied to retail department stores, which are analogous for all intents and purposes to retail food markets, is expressed in a number of cases. See, *e.g., Stern's Paramus,* 150 NLRB 799, 803; *J. W. Mays, Inc.,* 147 NLRB 968, 972; *Polk Bros., Inc.,* 128 NLRB 330, 331; *May Department Stores Co., Kaufmann Div.,* 97 NLRB 1007, 1008. Under this policy, the Board has treated a retail department store as a "plant unit" within the meaning of Section 9 of the Act, *supra.*

The Board has long recognized the presumptive appropriateness of the single-plant unit. *Beaumont Forg-*

ing Co., 110 NLRB 2200, 2201-2202; *Fredrickson Motor Express Corp.,* 121 NLRB 32, 33; *Temco Aircraft Corp.,* 121 NLRB 1085, 1088, n. 11; *Dixie Belle Mills, Inc.,* 139 NLRB 629, 631; *Liebmann Breweries, Inc.,* 142 NLRB 121, 125. See also, *e.g., NLRB v. Schill Steel Products,* 340 F. 2d 568, 574 (C.A. 5); *Sav-On Drugs, Inc.,* 138 NLRB 1032, 1033.

Thus, while a fraction of a store-wide unit, such as the snack bar employees herein, might itself constitute an appropriate bargaining unit, this does not detract from the validity of the broader unit, which is also an appropriate unit. *NLRB v. Smith,* 209 F. 2d 905, 907 (C.A. 9); *Foreman & Clark, Inc. v. NLRB,* 215 F. 2d 396, 405 (C.A. 9); cert den. 348 U.S. 887; *NLRB v. Quaker City Life Insurance Co.,* 319 F. 2d 690, 693 (C.A. 4); *Mountain States Telephone & Telegraph Co. v. NLRB,* 310 F. 2d 478, 480 (C.A. 10); cert. den. 371 U.S. 875; *NLRB v. Charles Smyth, et al.,* 212 F. 2d 664, 667-668 (C.A. 5); *Harris Langenberg & Co. v. NLRB,* 216 F. 2d 146, 148 (C.A. 8); *Mueller Brass Co. NLRB,* 180 F. 2d 402, 405 (C.A.D.C.).

Indeed, it is implicit in the Board's decision in the *Piggly-Wiggly* case, *supra,* that a store-wide unit in a retail food store involving snack bar employees may be appropriate. One of the predicates upon which the Board decided that case was its finding that no showing was made that the Retail Clerks Union and the Food Employers Council intended their contract apply to snack bar employees.

The decision of the Trial Examiner of the NLRB in the *Boys Markets, Inc.* Case, 156 NLRB, No. 6, discusses in great detail the course of negotiations between the Retail Clerks Union and the Food Employers Council

with regard to coverage of snack bar employees in the contract which ultimately was entered into for the period of April 1, 1964 through March 31, 1969. That contract most definitely spells out the parties' intention that it cover all snack bar employees of the Employer-members of the Council, except those already represented by the Culinary Workers Union.

On the other hand, the Culinary Workers Union in this case makes no claim whatsoever to represent any of the snack bar employees of the respective Employer parties herein.

Based on the foregoing, respondent Union contends that the unit set forth in the contract is appropriate, and that the requisite criteria for accretion are established herein. This assertion is founded on the following factors:

1. Snack bars are an integral and wholly related part of the markets' overall operations, involving the retail selling of food, groceries, and merchandise. Such markets are generally members of chain operations, and have common control of labor relations policies emanating from the central administrative office of the markets. The markets collectively bargain with the representatives of their employees on a multi-employer basis through the Food Employers' Council.

2. The snack bars sell food for both on-premises and off-premises consumption. Insofar as food sold for off-premises consumption is concerned, this service is wholly analogous to the function performed by all other areas of the market selling food, groceries, and general merchandise to the retail public for off-premises consumption. With regard to those food items sold for on-premises consumption, it is clear that this is an ad-

junct service, designed to attract customers to the markets.

3. It is conceded that the charging parties may have an historical interest in restaurants, but the nature of these operations as developed in the record demonstrates that snack bars are neither restaurants, nor generally comparable to restaurants. In some cases snack bars provide tables and chairs where customers may sit down and eat their food; however, in many cases there are no such facilities and food purchased at the snack bar must be consumed either off the premises or standing up at the counter. Food products sold at the snack bar are taken from other sections of the markets [Tr. 147].

4. Snack bars are located within the "four walls" of the market, generally immediately outside the checkstands, very much like liquor departments, whose clerks are members of the respondent Union [Tr. 75].

5. That the snack bar employees have a community of interest with other store employees in the Retail Clerks unit is demonstrated by the following facts:

(a) All employees observe the same hours [Tr. 76];

(b) All employees observe the same lunch hours [Tr. 76];

(c) All store employees have common supervision, in that each store has a single overall store manager responsible for the operations of each department, including the snack bar. Where a snack bar may have a manager, he is not a supervisor within the meaning of the Act, and therefore, the factor of common supervision is not thereby negated [Tr. 77];

(d) The snack bar manager performs functions similar to those of the managers of the other departments, such as grocery, produce, and meat, which managers do not have the power to hire or fire, and which departments do not constitute separate units [Tr. 105].

(e) There are occasional interchanges of employees, where clerks, clerks' helpers, or boxboys do snack bar work. Such employers under the Clerks' contract, ". . . do whatever services that are needed to be preformed while they are there." [Tr. 143];

(f) Snack bar employees occasionally transfer to other jobs in the stores [Tr. 130]. The terms and conditions of the employment of snack bar employees are identical to those of other employees in the store with regard to wages, hours, working conditions, and fringe benefits. Insofar as snack bar employees receive meals, the cost of such meals is deducted from their paychecks [Tr. 76-77].

(g) The same bulletin board applies to the snack bar employees and all other employees in the store [Tr. 105];

(h) All employees in the store have similar duties, in that all use cash registers and deal with the public in a sales capacity [Tr. 75].

In sum, snack bar employees and the other employees covered by the contract with the Retail Clerks Union have common interests, common supervision, common places of work, and common working conditions. In applying the tests to determine whether accretion is proper, as normally applied by the Board, the following should be noted: Separate administrative units do not exist, the snack bar employees work within the "four

walls" of the store, so that there is no question of geographical distance between the groups of employees involved; there is significant and substantial similarity of contractual conditions governing the groups of workers; and, some interchange of employees takes place, thus demonstrating a sufficient community of interest between the existing unit and the new group of employees to justify their accretion to the Retail Clerks' unit.

Strikingly in point here is the case of *Safeway Stores, Inc. and Local 37, Bakery and Confectionary Workers International Union of America,* 137 NLRB, No. 187, 50 LRRM 1481 (1962). In that case, the petitioning Union sought to represent a unit of in-store bakers employed in certain of the Employers' retail food stores in California. Retail Clerks Locals 899 and 770, intervenors therein, contended that the in-store bakers should be included in the existing multi-store units currently represented by those Locals as an accretion thereto.

These bakery shops were established in 1961 at three of the approximately 200 stores of the Employer in the greater Los Angeles area. The bakery shops were partitioned off from the bakery selling areas of the stores, and had ovens which were installed in such a manner as to afford customers a full view of the products being baked. The in-store bakers were initially hired as bakers, and were required to have some prior experience as bakers.

The Board found that they did not perform all of the functions customarily associated with that trade, and delineated the differences between their functions and those of bakers as they were normally understood. The

Board found that the in-store bakers thawed frozen dough and pre-baked products, and baked and decorated them as required; prepared icings, cream puffs, and eclairs, and prepared products from instant mixes. As part of their regular duties, the in-store bakers were found to have spent about 25% of their time in the selling areas within the bakery department. The Board further found that, except for differences in starting time, the bakers had essentially the same working hours and other conditions of employment as the other store employees in the Retail Clerks unit. Further, the Board found that the bakers, like all store employees, worked under direct supervision of the store manager.

The Board stated, finally, that

> "in all the circumstances of this case, including the fact that the in-store bakers do not exercise the full gamut of skills usually associated with the bakers' trade . . . we find that the four in-store bakers constitute an integral part of the operating personnel of the respective stores, whose employees are currently represented by the Intervenors as part of the existing multi-store units and are an accretion to such units."

The petition was, therefore, dismissed.

The analogy between *Safeway, supra,* and the instant case is manifest. These bakers were required to possess many of the skills of a distinct trade and did so; they spent no more than 25% of their time in selling activities; they worked in an area of the store no less distinct than the snack bars.

Notwithstanding these distinctions from other workers in the Clerks' unit, the Board found that they were

so integral a part of the operating personnel of the market as to preclude them from being a separate appropriate unit and to require their accretion to the existing Clerks' unit.

It is contended by respondent Union that the Board's decision in *Safeway* is correct, and that proper application of the standards therein applied compels a similar finding in the instant case; that is, the snack bar employees do constitute an accretion to the existing Clerks' unit, and for the Board to find to the contrary, as it has herein, is an abuse of its discretion.

See also, *Priced Less Discount Foods, Inc.,* 157 NLRB, No. 95, where the Retail Clerks requested a unit of all grocery employees, excluding meat department employees and delicatessen employees. The Board found that a separate unit of grocery employees, excluding meat department employees, was appropriate; however, it required that the delicatessen department employees must be included in the unit sought by the Clerks. Respondent Union also relies upon the case of *The Great A & P Tea Co.,* 140 NLRB 1011, where a "family savings department," in which small and large appliances were sold, was considered an accretion to the unit already represented by the Retail Clerks in that particular market.

In arguing that the Board did not abuse its discretion and exceed its authority in its Decision and Order herein, the General Counsel relies on the case of *Local 620, Allied Industrial Workers v. NLRB,* 375 F. 2d 707, 64 LRRM 2828 (CA. 6), among others. Respondent Union respectfully contends that reliance upon that case misconceives the essential question in the instant case and is therefore inapposite.

In that case, the question before the Court was whether

> "the boundries of the valid bargaining unit can be contractually extended by an Employer and Union to cover employees at a distant plant who never indicated their support of that Union." 64 LRRM, at 2831.

It is contended that the instant case is one where an appropriate unit was already in existence, and where the Board attempted to bypass the procedural requirements of Section 9(c) of the Act (which allows dissatisfied minority employees to seek separate representation) by holding that a new operating division within the unit did not constitute an accretion thereto. Respondent Union contends that this case is analogous to *NLRB v. Illinois Malleable Iron Co.*, 296 F. 2d 202, 49 LRRM 2103 (C. A. 7, 1961). First, as in the *Malleable* case, *supra*, this is not a representation case designed to determine prospective rights and obligations. It is, rather, an adjudication of the lawfulness of the past conduct of respondent Union and the respondent Employers.

In *Malleable*, the Employer, Appleton Electric Co., purchased the plant and other assets of Illinois Malleable Iron Co. when that company ceased operations. Appleton proceeded to integrate this new plant into its existing Chicago operations, for which operations it had entered into a collective bargaining agreement with Local 1031 of the International Brotherhood of Electrical Workers. Pursuant to that contract, which included a union security agreement employees at this newly acquired facility were required to join Local 1031. The National Labor Relations Board held that it was improper for these employees to be accreted to the ex-

isting bargaining unit, and ordered Appleton to cease and desist from unlawfully assisting Local 1031 by recognizing that Union as the bargaining representative of employees of the Malleable facility unless and until the Union had been certified as their bargaining representative. The Seventh Circuit denied the Board's petition for enforcement of its order, finding that there was an appropriate unit in existence and that the union security contract covering Appleton and Local 1031 was valid. The court stated significantly, 49 LRRM, at 2016:

> "To prohibit the inclusion of non-consenting minorities in the first instance in an appropriate larger unit before a question of representation has been raised is to refashion the statutory scheme.
>
> "The Board's attempt to make illegal the inclusion of prospective employees of after-acquired plants and divisions would seem to be contrary to a basic policy of the Act, to-wit: to achieve stability of labor relations." (Citation omitted).

The Court goes on to say:

> "We have herein an appropriate unit. In addition, the union security contract with Appleton was a valid contract. Of course, the Board has no power to reform the contract directly nor by indirection through the provisions of an order of the Board.
>
> "Neither the dues reimbursement remedy nor the Board's sweeping order can stand in the face of the employees participating in a contract negotiated in good faith with an undominated Union.
>
> "We think member Bean well stated the situation confronting Appleton when he said in his dis-

> senting opinion, '. . . Moreover, the agreement expressly provided that it should extend to plants thereafter acquired in the Chicago area. Appleton was thus faced with the alternative of applying, or refusing to apply, the agreement to the small group of new employees. It chose the alternative of honoring the agreement—a choice it made in good faith so far as the record shows. Accordingly it required the new employees to comply with lawful Union security provisions of the agreement.' "

This is almost precisely the case herein. Effective April 1, 1964, respondent Union and the Food Employers' Council entered into a collective bargaining agreement [G.C. Ex. 3], which provided that employees of the snack bars of the markets in the multi-employer unit would henceforth be covered by the collective bargaining agreement, and established wage rates and working conditions for those employees. That contract purported to cover all employees of the respective markets except those specifically excluded, which exclusions pertained to the employees of the meat department, and the janitors, both of whom were represented by other Unions, and employees working in snack bars who were already represented by the Culinary Workers Union, which recognized that the Culinary Workers had organized these employees at some of the member markets of the Food Employers' Council.

No reference was made to snack bar employees in the prior collective bargaining agreement between the Food Employers' Council and respondent Union. Since there was no bargaining history with respect to these employees, and on specific facts of the particular cases, a unit of snack bar employees at the Encino store of Piggly-Wiggly California Co. was found by the Board

to be appropriate, as were units of snack bar employees at stores of Boys Markets and Vons Grocery Company, respectively, in the Los Angeles area. (*Piggly-Wiggly California Co., supra, Boys Markets, Inc., supra.*) In each of those cases, the Culinary Workers Union had organized the employees of the snack bars; in the *Piggly-Wiggly* case the Board found that the Clerks and the Food Employers' Council did not intend their agreement to encompass those employees, while in the *Boys* case, the Culinary Workers Union had organized the snack bar employees during the time that the Food Employers' Council and respondent Union were negotiating for the inclusion of those employees in a multi-employer bargaining unit. In that case, the Board ruled that no real question concerning representation existed, in that the Retail Clerks had no "colorable claim" to represent snack bar employees.

In this case, it is asserted that there is no real question of representation in that no other Union seeks to represent snack bar employees, and therefore, the principles set forth by the Seventh Circuit in *Malleable* apply. This is a case where the Retail Clerks did in fact represent a majority of employees, including snack bar employees, in the appropriate unit. Since this is not a representation case where the prospective rights of the employees are involved, respondent Union and respondent Council were proceeding in accord with the principles of *Malleable* in applying the colective bargaining agreement to all employees which that agreement purported to cover.

While this statutory scheme does afford an incumbent Union an advantage over potential rivals in the absence of a real question of representation, as in the instant case, "the Board may not lawfully dissipate that

advantage." *NLRB v. Illinois Malleable Iron Co., supra, Teamsters Local v. NLRB,* 365 U.S. 667, 675-675, 47 LRRM 2906. By attempting to prohibit the inclusion of what may become a nonconsenting minority in the appropriate larger unit before a real question concerning representation has been raised, the Board, to quote the Court in *Malleable,* is seeking "to refashion the statutory scheme."

Contrary to the assertion of the Board, it is clear that this is not a situation where an Employer has concluded a collective bargaining agreement with a minority Union as was the case in *International Ladies' Garment Workers' Union v. NLRB,* 280 F. 2d 616, 620, aff. 366 U.S. 731. On the contrary, this is a case where the Retail Clerks Union represented a majority of employees in the appropriate unit, and a valid collective bargaining agreement, setting forth the terms and conditions of employment, was given effect by the parties to the contract. No other labor organization has sought or seeks to represent these snack bar employees; hence, no real question of representation exists herein.

Conclusion.

Therefore, the principles set forth in *Malleable,* are applicable, and for that reason the petition for enforcement of the Board's order should be denied.

Respectfully submitted,

Arnold, Smith & Schwartz,
Kenneth M. Schwartz,
Laurence D. Steinsapir,
Jack M. Newman,
Attorneys for Respondent, Retail Clerks Union Local 770.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JACK M. NEWMAN

APPENDIX A.

Section 9(c) National Labor Relations Act.

Sec. (c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a):

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

No. 22,378

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

VICTOR F. WHITTLESEA, d/b/a
WHITTLESEA BLUE CAB COMPANY

and

AUTOMOTIVE WORKERS & WAREHOUSEMEN, LOCAL NO. 881,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

FRANK H. ITKIN,
PETER M. GIESEY,
Attorneys,

National Labor Relations Board.

FILED

FEB 5 1968

WM. B. LUCK, CLERK

I N D E X

Page

Jurisdiction -- 1

Statement of the Case ------------------------------------ 2

I. The Board's Findings of Fact -------------------- 2

II. The Board's Conclusions and Order --------------- 6

Argument --- 7

Substantial evidence on the record as a whole supports the Board's finding that the Union violated Section 8(b)(2) and (1)(A) of the Act by causing the company to withhold employment from employee Shuman ----------------------------- 7

Conclusion --- 13

Certificate -- 13

Appendix --- 14

AUTHORITIES CITED

Cases:

International Brotherhood of Electrical Workers v. N.L.R.B., 181 F. 2d 34 (C.A. 2), affirmed, 341 U.S. 694 -- 9

Local 771, International Alliance of Theatrical etc., 131 NLRB 1 ---------------------------------- 12

Lummus Co. v. N.L.R.B., 339 F. 2d 728 (C.A.D.C.) ------ 7

N.L.R.B. v. Allis Chalmers Mfg. Co., ____ U.S. ____, 87 Sup. Ct. 2008-2009 ------------------------ 8

N.L.R.B. v. Brown, 310 F. 2d 539 (C.A. 9) ------------ 11

N.L.R.B. v. Cement Masons Local No. 555, 225 F. 2d 168 (C.A. 9) --------------------------------------- 11

N.L.R.B. v. Die & Tool Makers Lodge No. 113, 231 F. 2d 298 (C.A. 7), cert. denied, 352 U.S. 833 ----- 8

N.L.R.B. v. General Motors Corp., 373 U.S. 734 -------- 7

N.L.R.B. v. International Association of Machinists, Local No. 504, 203 F. 2d 173 (C.A. 9) -------------- 8

N.L.R.B. v. Int'l Ass'n of Machinists, 263 F. 2d 796 (C.A. 9) --------------------------------------- 6

N.L.R.B. v. International Longshoremen's & Warehousemen's Union, 210 F. 2d 581 (C.A. 9) ------- 9

N.L.R.B. v. International Longshoremen's & Warehousemen's Union, 214 F. 2d 778 (C.A. 9) ------- 9

N.L.R.B. v. International Longshoremen's & Warehousemen's Union, Local 12, 378 F. 2d 125 (C.A. 9) -- 6

N.L.R.B. v. International Union of Automobile Workers, 194 F. 2d 698 (C.A. 7) --------------------------- 8

Cases -- continued

Page

N.L.R.B. v. Jarka Corp. of Phila. Local 1291, ILA, 198 F. 2d 618 (C.A. 3) ---------------------- 8
N.L.R.B. v. Leece-Neville Company, 330 F. 2d 242 (C.A. 6) -- 8
N.L.R.B. v. Local Union No. 450, 281 F. 2d 313 (C.A. 5) -- 8
N.L.R.B. v. Local 490, International Hod Carriers, etc., 300 F. 2d 328 (C.A. 8) ---------------------- 8
N.L.R.B. v. Local 776, IATSE (Film Editors), 303 F. 2d 513 (C.A. 9), cert. denied, 371 U.S. 826 ----- 9,12
N.L.R.B. v. Miami Valley Carpenters District Council, 297 F. 2d 920 (C.A. 6) --------------------------- 9
N.L.R.B. v. A & B Zinman, Inc., 372 F. 2d 444 (C.A. 2)- 8
Radio Officers' Union v. N.L.R.B., 347 U.S. 17 -------- 8
Union Starch & Refining Co. v. N.L.R.B., 186 F. 2d 1008 (C.A. 7), cert. denied, 342 U.S. 815 --------- 8

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*):
Section 7 -- 7
Section 8(a)(1) -- 2,6
Section 8(a)(3) -- 2,6,7
Section 8(b)(1)(A) ------------------------------------- 2,7
Section 8(b)(2) -- 2,7,8
Section 10(e) -- 1,6

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,378

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

VICTOR F. WHITTLESEA, d/b/a
WHITTLESEA BLUE CAB COMPANY

and

AUTOMOTIVE WORKERS & WAREHOUSEMEN, LOCAL NO. 881,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.),[1/] for enforcement of its order (R. 46-47, 16-28),[2/] issued on

---

1/ Pertinent statutory provisions are reprinted *infra*, pp. 15-16 , as Appendix B.

2/ References to the pleadings, reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript of the hearing, reproduced pursuant to Rules 10 and 17 of this Court as "Volume II, Transcript of Record", are designated "Tr." References to the General Counsel's exhibits are designated "G.C. Exh."

December 14, 1966, against respondents Victor F. Whittlesea, doing business as Whittlesea Blue Cab Company (herein, "the Company"), and Automotive Workers & Warehousemen, Local No. 881, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein, "the Union"). The Board's decision and order are reported at 162 NLRB No. 17. This Court has jurisdiction, the unfair labor practices having occurred in Las Vegas, Nevada. No jurisdictional issue is presented.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board found that the Union violated Section 8(b)(2) and (1)(A) of the Act by causing the Company to withhold employment from employee Warden Shuman because he refused to picket other employers or, alternatively, pay the Union a "picketing fee" of $15. In addition, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by discriminating against the employee at the request of the Union. The facts underlying the Board's findings are summarized below:

The Company is engaged in the taxi cab business in Las Vegas, Nevada, and its driver-employees are represented by the Union (R. 17, 18; Tr. 10-12, 13). During early 1966,[3/] the Union was engaged in a strike against two taxi cab enterprises (other than respondent Company) in Las Vegas, Nevada, and required its membership -- including respondent Company's

3/ All dates hereinafter refer to 1966, unless otherwise indicated.

drivers -- to picket the struck firms or, alternatively, pay the Union a "picketing fee" of $15 (R. 18; Tr. 8, 10-13, 55-58, 62-64, 67, 70, 91-92, 100-103, 105, 126, 148). Thus, during the first week in January, Union Representative Buckley gave Company Personnel Manager Baldwin a list of approximately 50 drivers employed by that Company, and requested him to "send these men over /to the Union Hall/ before they went to work" for "picket duty" (R. 18; Tr. 52-58, 62-64, 70, 91, 111-112, 126). Baldwin, in turn, gave the list to the Company's dispatchers with written instructions that "the men on the list should see the Union before they went to work" (R. 18; Tr. 62). In addition, the Company posted on its bulletin board in the drivers' room a Union notice requiring the employer's drivers "to either walk the picket" line "or pay /a/ $15 replacement fee" to the Union (R. 18; Tr. 12, 57-58, 62-64, 91).[4/]

Warden Shuman, employed by the Company as a taxi cab driver since March 1964, failed to report to the Union for picket duty as required in the posted instructions (R. 18; Tr. 8). On Friday, January 7, Shuman presented himself at the employer's dispatcher window for his "trip sheet" preparatory to starting his shift.[5/] Company Dispatcher Everts

---

4/ Union Representative Buckley acknowledged before the Board that the Company's drivers could be "relieved of picket duty" by paying a "$15 donation" to the Union (R. 18; Tr. 126).

5/ The Company has a dispatcher for each of its three shifts, who issues daily "trip sheets" to drivers as they report for work, dispatches the drivers on calls, and transmits orders and other information from management to the drivers. A "trip sheet" contains the employee's name, taxi cab number, and pertinent information relating to the trips he makes that day. A driver, at the end of his shift, turns in this sheet to the Company together with his fare collections. "Trip sheets" are required by local law and taxi cab drivers may not work without one. (R. 18, 20; Tr. 8-9, 19-20, 23, 39, 43-44, 97, 101-102, 103-105, 138-140.)

instead handed the employee a note containing Shuman's name and the instruction: "see Union before going to work" (R. 18; Tr. 8-10, 12, 15-16, 20).[6/] Shuman, unable to work without a "trip sheet" (supra, n. 5), immediately made a telephone call to the Union Hall. When he received no answer, he placed a call to the home of Union Secretary-treasurer Richard Thomas. Thomas was not there, and Shuman left a message that he had called (R. 19; Tr. 9-10).

On Monday, January 10, Shuman -- not having heard from Thomas -- again called the Union Hall, and spoke with Thomas (R. 19; Tr. 9-11). Shuman told the Union official that he "had been held off work" (R. 19; Tr. 10). Thomas, after making inquiry about the matter, then explained to Shuman (Tr. 10): "It was just a little matter of paying /the/ $15 picket fee or walking the picket line." The employee, however, asserted that he saw no reason for this inasmuch as he was not on strike. Thomas replied that the Union's membership had voted for the requirement and "that is the way it is" (Tr. 10). Shuman then stated that "the only course I have got * * * /is/ to take this to the National Labor Relations Board", whereupon Thomas concluded the conversation by telling Shuman that he could "take it any place /he/ wanted" (R. 19; Tr. 10-11, 148).

On the next day, January 11, Shuman called Milford Prine, a Company official, and told Prine that the employee had been denied work because he refused to picket or pay the fee (R. 19; Tr. 13). Prine commented that there was no strike at respondent Company and the employer

---

6/ On that same day, Company driver Elwood Purdy was similarly told by his dispatcher, Lola Balsen, that he "was supposed to go over to the Union Hall and pay the Union or else /he/ wouldn't drive the next morning" (R. 21; Tr. 99-105, 109). Purdy thereafter made the $15 "contribution" to a Union representative (ibid.).

had a contract with the Union (ibid.). Shuman informed Prine that he had written the Labor Board about this matter, and the Company official then stated "I guess that is about all you can do" (Tr. 13-14). Thereafter, on January 20, Shuman went to the Company's office and asked Prine to explain "how they could hold me off /since/ they weren't on strike" (R. 19; Tr. 15). Prine told the employee (R. 19; Tr. 15-16):

> * * * /the Company/ had nothing personally against /him/, but * * * they can't very well put /him/ to work because * * * possibly /the Union/ would throw a picket line around /the Company/ and stop their whole operation.

Later that day, Shuman informed Prine that he would file unfair labor practice charges against both the Union and the Company (R. 19; Tr. 17).

On the following day, January 21, Company Personnel Manager Baldwin had a note posted on the bulletin board in the dispatchers' room, stating (R. 20; Tr. 58-61, G.C. Exh. 2): "Schuman /sic/ can work".[7/] However, information posted on the bulletin board in the dispatchers' room was not available to the Company's drivers, and neither the Company nor the Union made any effort to inform employee Shuman that he could return to work (R. 20; Tr. 59,62, 64).

Thereafter, on February 11, a Board agent, investigating the unfair labor practice charges filed by Shuman, learned of this notice and so informed the employee. Shuman then called Prine, who told the employee that he could return to work (R. 20; 7, 17, 18). Shuman resumed work that day (ibid.).

7/ According to Baldwin, he posted this notice following a telephone conversation with Union secretary-treasurer Thomas, wherein each assertedly disclaimed "holding" Shuman off of his job (R. 20; Tr. 58-59).

II. The Board's Conclusions and Order

On the foregoing facts, the Board, in agreement with the Trial Examiner (R. 46-47, 20-22), found that the Union violated Section 8(b)(2) and (1)(A) of the Act by causing the Company to deny employment to Shuman from January 7 to February 11, 1966, because the employee did not report to the Union for picket duty against other employers or, alternatively, pay the $15 fee required by the Union. The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by this discrimination against its employee. The Board therefore ordered the Union and the Company to cease and desist from the unfair labor practices found, to jointly and severally make Shuman whole for any loss of pay sustained by reason of the discrimination against him, and to post appropriate notices (R. 22-28, 47).[8/]

8/ Respondent Company filed no exceptions to the Trial Examiner's decision, which was adopted by the Board (R. 46). Under Section 10(e) of the Act, "No objection that has not been urged before the Board * * * shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Respondent Company has made no attempt to excuse this failure and, in addition, has not filed an answer to the Board's petition for enforcement in accordance with Rule 34(4) of the Court. The Company is therefore barred from controverting the Board's finding that it violated Section 8(a)(3) and (1) of the Act. See, e.g., N.L.R.B. v. Int'l Longshoremen's & Warehousemen's Union, Local 12, 378 F. 2d 125, 131 (C.A. 9), and N.L.R.B. v. Int'l Ass'n of Machinists, 263 F. 2d 796, 799 (C.A. 9) (and cases cited).

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE UNION VIOLATED SECTION 8 (b)(2) AND (1)(A) OF THE ACT BY CAUSING THE COMPANY TO WITHHOLD EMPLOYMENT FROM EMPLOYEE SHUMAN

Section 8(b)(2) of the Act is explicity directed at the elimination of improper union interference with employee job opportunities. That section, in relevant part, forbids "a labor organization or its agents * * * to cause or attempt to cause an employer to discriminate against an employee in violation of /section 8(a)(3)/ * * * ". The latter section in turn, forbids employer "discrimination in regard to hire or tenure of employement to encourage or discourage membership in any labor organization * * *". 9/ In addition, Section 8(b)(1)(A) makes it an unfair labor practice for a union to restrain or coerce an employee in the exercise of his rights under Section 7 of the Act, including the right to refrain from "any or all" concerted activities (App. B., infra, pp. 15-16).

It is well established that a union violates the foregoing provisions by causing or attempting to cause an employer to discharge or otherwise discriminate against an employee "if the union's action * * * was intended to discipline an individual * * * for violation of union rules, or to encourage individuals to accept the authority of union officers * * * ". Lummus Company v. N.L.R.B., 339 F. 2d 728, 733-734 (C.A.D.C.) (footnotes omitted). Thus, a union may not procure

9/ A proviso to Section 8(a)(3) permits an employer and a union, in certain circumstances, to enter into an agreement requiring employees, as a condition of continued employment, to become and remain members of the union. Respondent Company and the Union did not assert before the Board that Shuman was denied employment under the terms of a valid union-security agreement. Cf., N.L.R.B. v. General Motors Corp., 373 U.S. 734, 734-744.

the discharge of an employee because of his "union-connected activities". N.L.R.B. v. A.B. Zinman, Inc., 372 F. 2d 444 (C.A. 2).[10/] And see, Radio Officers Union v. N.L.R.B., 347 U.S. 17, 25-26, 40-42; N.L.R.B. v. Allis Chalmers Mfg. Co., _____ U.S. ______, _____, 87 Sup. Ct. 2008-2009.

It is also well established that an express demand by the union that an employer discriminate against an employee is not required in order to find a violation of Section 8(b)(2). As the Third Circuit stated in N.L.R.B. v. Jarka Corp., 198 F. 2d 618, 621 (C.A. 3):

10/ The courts, in agreement with the Board, have repeatedly held that a union violates Section 8(b)(2) -- even under a union-security agreement -- where it causes an employer to discriminate against an employee because he has "violated union rules by working for an 'unfair' employer" (N.L.R.B. v. Local 490, International Hod Carrier, etc., 300 F. 2d 328, 332 (C.A. 8)); or by requiring "any member of the union who had not walked the picket line /to/ be placed at the bottom of the out-of-work list and assessed $7.50 for each tour of picket duty missed" (N.L.R.B. v. Local Union No. 450, 281 F. 2d 313, 316 (C.A. 5)); or because employees did not "contribute their weekly 'donations' to the union's strike fund", as required (N.L.R.B. v. Die & Tool Makers Lodge No. 113, 231 F. 2d 298, 299 (C.A. 7), cert. denied, 352 U.S. 833); or because of an employee's failure to pay a fine or debt owed to a union, or attend a union meeting (N.L.R.B. v. Leece-Neville Company, 330 F. 2d 242, 245-246 (C.A. 6); N.L.R.B. v. International Association of Machinists, Local No. 504, 203 F. 2d 173, 176 (C.A. 9); N.L.R.B. v. International Union of Automobile Workers, 194 F. 2d 698 (C.A. 7); Union Starch & Refining Co. v. N.L.R.B., 186 F. 2d 1008 (C.A. 7), cert. denied, 342 U.S. 815).

> Here there was an adequate showing that the union "caused" the employer to discriminate against the employees as complained. This relationship of cause and effect, the essential feature of Section 8(b)(2), can exist as well where an inducing communication is in terms courteous or even precatory as where it is rude and demanding * * *. It is essentially a question of fact in each case what has caused an employer to discriminate unlawfully against organized or unorganized workers. If the Board finds that the union accomplished this result by its acts, whether verbal or otherwise, the fundamental requirement of Section 8(b)(2) has been met.

Thus, conduct of union representatives, which is "tantamount to a request to discriminate with respect to the terms of" an individual's employment, and "reasonably calculated to bring about that result," violates the Act. N.L.R.B. v. Miami Valley Carpenters District Council, 297 F. 2d 920, 921 (C.A. 6). And see, N.L.R.B. v. Local 776, IATSE (Film Editors), 303 F. 2d 513, 516 (C.A. 9), cert. denied, 371 U.S. 826; N.L.R.B. v. International Longshoremen's and Warehousemen's Union, 214 F. 2d 778, 780 (C.A. 9); N.L.R.B. v. International Longshoremen's and Warehousemen's Union, 210 F. 2d 581, 584 (C.A. 9); International Brotherhood of Electrical Workers v. N.L.R.B., 181 F. 2d 34, 38 (C.A. 2), affirmed, 341 U.S. 694.

The Board, in applying the foregoing principles to the credited evidence in this case (supra, p. 6), properly found that the Union unlawfully caused the Company to deny employment to Shuman, because the employee did not comply with the Union's requirement that he picket other employers or, alternatively, pay the $15 fee. As noted above (supra, p. 6, n. 8), the Examiner's finding, adopted by the Board, that the Company withheld employment from Shuman for this unlawful reason is not controverted here. It is clear that the employer, at the

request of the Union, instructed its drivers to "see the Union before they went to work" and thus comply with the Union's directive (supra, p. 3). Driver Purdy was pointedly admonished by the Company's dispatcher "to go over to the Union Hall and pay the Union or else /he/ wouldn't drive the next morning" (supra, p. 4 , n. 6). Driver Shuman was denied his "trip sheet" by his dispatcher and, instead, instructed to "see /the/ Union before going to work" (supra, p. 4). Indeed, Company official Prine later admitted to Shuman that the employer was withholding his work because it feared that the Union "would throw a picket line around /the Company/ and stop their whole operation" (supra, p. 5) 11/

It is also evident that the denial of work to Shuman was at the Union's behest. The Union had determined that its membership must either picket the struck employers or pay the prescribed fee (supra, p. 4). The Company was apprised of this determination, and was requested by the Union to "send these men over /to the Union Hall/ before they went to work" (supra, p. 3). Shuman, however, failed to comply with the Union's directive and was denied employment (supra, p. 4). When the employee, immediately thereafter, informed Union Secretary-treasurer Thomas that he "had been held off work", Thomas acknowledged this discriminatory reason by stating to Shuman: "It was just a little matter of paying /the/ $15 picket fee or walking the picket line"

11/ Company Comptroller Felegy, in his testimony before the Trial Examiner, explained that the employer's personnel manager had "informed /him/ there were 50 or 60 drivers that were to be sent to the Union Hall for clearances on a matter of a strike sanction, to set up * * * pickets or to pay an X number of dollars * * *" (Tr. 91).

(supra, p. 4). Indeed, it was not until after Shuman warned his employer that he would file unfair labor practice charges against both the Union and the Company, that a notice was posted at the employer's premises, stating "/Shuman/ can work" (supra, p. 5).[12/]

Before the Board, respondent Union relied heavily upon N.L.R.B. v. Brown, 310 F. 2d 539 (C.A. 9) (R. 34-35). In that case, the Court found that the employee "was not actually or constructively discharged. He voluntarily left his employment * * * and refused an offer of reinstatement tendered to him prior to the earliest date on which he would have been subject to discharge under the union-security agreement" between the union and the employer (id. at 547). The facts are plainly inapposite to those found here. It is manifest that Shuman could not work without a "trip sheet" (supra, p. 3 , n. 5), and the Company withheld this document from the employee as a means of compelling him to "see /the/ Union" and comply with its directive (supra, p. 4). Like Purdy (who paid the $15), Shuman was being compelled to picket or pay the fee if he wanted to work (supra, p. 4). "No set words are necessary to constitute a discharge; words or conduct, which would logically lead an employee to believe his tenure had been terminated, are in themselved sufficient" N.L.R.B. v. Cement Masons Local No. 555, 225 F. 2d 168, 173 (C.A. 9). Moreover, Shuman's repeated efforts to be reinstated, directed toward the Company and the Union, plainly refute the Union's contention that the employee failed "to

---

12/ As shown, this notice was posted in the Company's dispatcher room where it could not be seen by the employee; Shuman was not made aware of his right to return to work until February 11 (supra, p. 5).

make inquiry as to whether or not he was held off work * * *" (R. 35).

The Union also argued before the Board (R. 36) that "the denial of work to Shuman was /not/ at the Union's behest * * *". As shown above, the credited evidence in this case amply supports the finding that the Union caused this denial of work. The facts found by the Board in Local 771, International Alliance of Theatrical etc., 131 NLRB 1 (cited by the Union, R. 37), are inapposite here. "/Here/, the Trial Examiner's deduction that respondent /Union/ was the motivating factor affords a logical explanation buttressed by cogent evidence". N.L.R.B. v. Local 776, IATSE (Film Editors), supra, 303 F. 2d at 519.

Under these circumstance, the Board reasonably concluded that the Union's conduct was "tantamount to a request to discriminate with respect to the terms of" Shuman's employment, and "reasonably calculated to bring about this result" (supra, p. 6). In sum, the Board reasonably concluded that the Company unlawfully denied employment to Shuman, at the behest of the Union, because the employee refused to obey the Union's directive (see cases supra, pp. 7, 8, 9).

CONCLUSION

For the reasons stated, it is respectfully requested that the Board's order be enforced in full.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

FRANK H. ITKIN,
PETER M. GIESEY,
Attorneys,

National Labor Relations Board.

February 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and, in his opinion, the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board.

APPENDIX A

Pursuant to Rule 18(f) of the Rules of this Court, petitioner presents the following table of exhibits. Page references are to Volume II, Transcript of Record:

EXHIBITS	Identified	Offered	Rec'd in Evidence
General Counsel's Exhibits 1(a) through 1(c)	5	5	6
General Counsel's Exhibit No. 2	60	61	61
General Counsel's Exhibit No. 4	87	92	93

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, et seq.) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the begining of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided

in Section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in Section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues the initiation fees uniformly required as a condition of acquiring or retaining membership.

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents --

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7:

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership:

* * *

No. 22379

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA AND
STEWART UDALL, SECRETARY OF THE
INTERIOR OF THE UNITED STATES OF AMERICA,

Appellants

v.

JACK A. WALKER, Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF FOR THE UNITED STATES AND STEWART UDALL, SECRETARY OF THE INTERIOR, APPELLANTS

CLYDE O. MARTZ,
Assistant Attorney General.

SYLVAN A. JEPPESEN,
United States Attorney,
Boise, Idaho, 83701.

JAY F. BATES,
Assistant United States Attorney,
Boise, Idaho, 83701.

ROGER P. MARQUIS,
Attorney, Department of Justice,
Washington, D. C., 20530.

FILED

APR 18 1968

WM. B. LUCK, CLERK

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	6
Specifications of errors	15
Summary of argument	16
Argument:	
I. The district court had no jurisdiction of this case	19
A. The United States has not consented to this suit	20
B. Except for the 1962 mandamus statute the district court had no jurisdiction over the Secretary of the Interior	28
C. The mandamus statute of 1962 did not vest the district court with jurisdiction to review actions taken under the Mining Claims Occupancy Act of 1962	30
II. Rejection of the departmental decision was not warranted	35
A. Congress did not confer upon Walker a litigable right to claim an interest in the public domain	35
B. Walker's expressed purpose for use of the property is contradictory to the congressional purposes in passing the 1962 Act	42
C. The departmental rejection of Walker's application was fully supported by the facts	43
D. The order directing a hearing was unwarranted	45
Conclusion	48

CITATIONS

Cases:

Adams v. Witmer, 271 F.2d 29	24
Aktiebolaget Bofors v. United States, 194 F.2d 145	25
Alaska Smokeless Coal Co. v. Lane, 250 U.S. 549	34

Cases cont'd: Page

Best v. Humboldt, 371 U.S. 334 ---------------- 45
Blackmar v. Guerre, 342 U.S. 512 -------------- 30
Bowdoin v. Malone, 284 F.2d 95 ---------------- 27
Chournos v. United States, 335 F.2d 918 ------- 24
Coleman v. United States, 363 F.2d 190 -------- 24
Cyrus v. United States, 226 F.2d 416 ---------- 25
Decatur v. Paulding, 14 Pet. 497 -------------- 33
District of Columbia v. Johnson, 165 U.S. 330 - 40
Dredge Corporation v. Penny, 362 F.2d 889 ----- 47
Dugan v. Rank, 372 U.S. 609 ------------------- 22
Edwards v. United States, 163 F.2d 268 -------- 26
Ernst v. Secretary of the Interior, 244 F.2d 344 -- 28
Estrada v. Ahrens, 296 F.2d 690 --------------- 27
Ferry v. Udall, 336 F.2d 706, cert. den., 381 U.S. 904 ------------------------------------ 41, 46
Gardner v. Harris, ___ F.2d ___ (Mar. 26, 1968) -- 20
Great Northern Ry. Co. v. United States, 315 U.S. 262 ------------------------------------ 41
Hall v. Payne, 254 U.S. 343 ------------------- 34
Larson v. Domestic & Foreign Corp., 337 U.S. 682 -- 23
LaRue v. Udall, 324 F.2d 428, cert. den., 376 U.S. 907 ------------------------------------ 46
Litchfield v. Register and Receiver, 9 Wall. 575 -- 34
Malone v. Bowdoin, 369 U.S. 643 --------------- 27
Martinez v. Seaton, 285 F.2d 587 -------------- 29
Mulry v. Driver, 366 F.2d 544 ----------------- 27
Munro v. United States, 303 U.S. 36 ----------- 26
Ness v. Fisher, 223 U.S. 683 ------------------ 34
Pine Hill Co. v. United States, 259 U.S. 191 -- 40
Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 ---------------------- 33
Riverside Oil Co. v. Hitchcock, 190 U.S. 316 -- 34
Soriano v. United States, 352 U.S. 270 -------- 26
State of California v. Rank, 293 F.2d 340, aff'd on reh., 307 F.2d 96 ------------------ 22
Twin Cities Chippewa Tribal C. v. Minnesota Chippewa Tribe, 370 F.2d 529 ----------------- 25
United States v. Oregon &c. Railroad, 164 U.S. 526 -- 41

Cases cont'd: Page

United States v. Sherwood, 312 U.S. 584 ------- 23, 26
United States v. Union Pacific R. Co., 353 U.S. 112 -- 41
United States v. Wilbur, 283 U.S. 414 --------- 34
Webster Groves Union Trust Company v. Saxon, 370 F.2d 381 -------------------------------- 46
West v. Hitchcock, 205 U.S. 80 ---------------- 34
White v. Administrator of General Services Admin. of U.S., 343 F.2d 444 ------------------ 22
Wilbur v. United States, 281 U.S. 206 --------- 34
Work v. Rives, 267 U.S. 175 ------------------- 34

Statutes:

Administrative Procedure Act, 5 U.S.C. sec. 1009 (now codified at 5 U.S.C. secs. 703 *et seq.*) -- 19, 26, 41
Multiple Use Act of 1955, 69 Stat. 367, 30 U.S.C. sec. 601 -------------------------------- 37
Mining Claims Occupancy Act, October 23, 1962, P.L. 87-851, 76 Stat. 1127 ----------------- 30
28 U.S.C. sec. 1346 --------------------------- 19
28 U.S.C. secs. 1361, 1391(e) ----------------- 17, 24

Miscellaneous:

43 C.F.R. sec. 1843.5 ------------------------- 47
108 Cong. Rec.:
p. 19645 ------------------------------------ 40
p. 19646 ------------------------------------ 45
p. 19647 ------------------------------------ 18, 43
p. 19648 ------------------------------------ 43
p. 19649 ------------------------------------ 40
p. 19650 ------------------------------------ 40
Hearings, S. Committee on Interior and Insular Affairs, S. 3451, 87th Cong., 2d sess. (1962)- 39, 45
Senate Report, No. 1984, 87th Cong., 2d sess. (1962) ------------------------------------- 37, 39
2 U.S. Cong. News, 87th Cong., 2d sess. (1962)- 31

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22379

UNITED STATES OF AMERICA AND
STEWART UDALL, SECRETARY OF THE
INTERIOR OF THE UNITED STATES OF AMERICA,

Appellants

v.

JACK A. WALKER, Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF FOR THE UNITED STATES AND STEWART UDALL,
SECRETARY OF THE INTERIOR, APPELLANTS

OPINION BELOW

The memorandum opinion of the district court (R. 132-137) is not reported.

JURISDICTION

Jurisdiction was sought to be invoked under the Administrative Procedure Act, then 5 U.S.C. sec. 1009 (now codified at 5 U.S.C. secs. 703 *et seq.*), and 28 U.S.C. sec. 1346 (R. 5). The district court based jurisdiction upon the Administrative Procedure Act (R. 132). Appellants contend that the court had no jurisdiction of the action. Judgment was entered on July 3, 1967 (R. 4, 137). Notice of appeal was filed August 25, 1967 (R. 44, 138). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

In 1955, Congress provided for stricter enforcement of mining law restrictions, including confinement of possession of claims to use for mining purposes. In 1962, the Mining Claims Occupancy Act authorized the Secretary of the Interior to convey fee title or a lesser interest of a maximum of five acres (reserving minerals to the United States) surrounding residences on invalid mining claims which had been continuously occupied since 1955. The Secretary rejected Walker's application for a fee patent. The questions presented are:

1. Whether the District Court for Idaho had jurisdiction of a suit brought against the United States and the Secretary of the Interior to overturn the rejection of the application and, if so,

2. Whether, in view of the wide discretion granted the Secretary and the facts of this case, showing little occupation and a purpose to pursue mineral exploration in the national forest, the court was warranted in vacating the Secretary's decision and in directing the holding of a hearing.

STATUTES INVOLVED

The Mining Claims Occupancy Act of October 23, 1962, P.L. 87-851, 76 Stat. 1127, provides:

Section 1 (30 U.S.C. sec. 701)

The Secretary of the Interior may convey to any occupant of an unpatented mining claim which is determined by the Secretary to be invalid an interest, up to and including a fee simple, in and to an area within the claim of not more than (a) five acres or (b) the acreage actually occupied by him, whichever is less. The Secretary may make a like conveyance to any occupant of an unpatented mining claim who, after notice from a qualified officer of the United States that the claim is believed to be invalid, relinquishes to the United States all rights in and to such claim which he may have under the mining laws. Any conveyance authorized by this section, however, shall be made only to a qualified applicant, as that term is defined in section 702 of this title, who applies therefor within five years from October 23, 1962, and upon payment of an amount established in accordance with section 705 of this title.

As used in this section, the term "qualified officer of the United States" means the Secretary of the Interior or an employee of the Department of the Interior so designated by him: Provided, That the Secretary may delegate his authority to designate qualified officers to the head of any other department or agency of the United States with respect to lands within the administrative jurisdiction of that department or agency.

Section 2 (Id., sec. 702)

For the purposes of this chapter a qualified applicant is a residential occupant-owner, as of October 23, 1962, of valuable improvements in an unpatented mining claim which constitute for him a principal place of residence and which he and his predecessors in interest were in possession of for not less than seven years prior to July 23, 1962.

Section 3 (Id., sec. 703)

Where the lands for which application is made under section 701 of this title have been withdrawn in aid of a function of a Federal department or agency other than the Department of the Interior, or of a State, county, municipality, water district, or other local governmental subdivision or agency, the Secretary of the Interior may convey an interest therein only with the consent of the head of the governmental unit concerned and under such terms and conditions as said head may deem necessary.

Section 5 (Id., sec. 705)

The Secretary of the Interior, prior to any conveyance under this chapter, shall determine the fair market value of the interest to be conveyed, exclusive of the value of any improvements placed on the lands involved by the applicant or his predecessors in interest. Said value shall be determined as of the date of appraisal. In establishing the purchase price to be paid by the applicant for the interest, the Secretary shall take into consideration any equities of the applicant and his

predecessors in interest, including conditions of prior use and occupancy. In any event the purchase price for any interest conveyed shall not exceed its fair market value nor be less than $5 per acre. The Secretary may, in his discretion, allow payment to be made in installments.

Section 7 (Id., sec. 707)

In any conveyance under this chapter the mineral interests of the United States in the lands conveyed are reserved for the term of the estate conveyed. Minerals locatable under the mining laws or disposable under sections 601-604 of this title, are withdrawn from all forms of entry and appropriation for the term of the estate. The underlying oil, gas, and other leasable minerals of the United States are reserved for exploration and development purposes, but without the right of surface ingress and egress, and may be leased by the Secretary under the mineral leasing laws.

The Act of October 5, 1962, 76 Stat. 744, provides:

Section 1 (28 U.S.C. sec. 1361)

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Section 2 (28 U.S.C. sec. 1391(e))

(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may,

> except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.
>
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

The Administrative Procedure Act as codified provides (5 U.S.C. sec. 703):

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

STATEMENT

This is an appeal by the United States and the Secretary of the Interior from an order purporting to set aside a

decision of the Secretary of the Interior which denied an application of appellee to purchase a five-acre tract of land within the Payette National Forest and directing that the applicant be afforded an administrative hearing (R. 132-137).

The amended complaint, filed in January 1967, naming the United States and the Secretary of the Interior as defendants, alleged location of the Bobbin Quartz Mining Claim in Idaho in 1950 and the filing in January 1964 of an application under the Mining Claims Occupancy Act, accompanied with a relinquishment of Bobbin location (R. 24). The complaint alleged rejection of the application in May 1964 without a hearing and unsuccessful appeal to the Bureau of Land Management and the Secretary. It was alleged that the decision was wrong, was reached without a public hearing and was arbitrary, capricious and not supported by substantial evidence. The relief sought was reversal of the departmental decision, allowance of the application for a patent and direction of "such orders or deeds as may be required to give plaintiff herein complete relief" and other appropriate equitable relief (R. 23-26). By answer defendants denied error, denied jurisdiction to grant relief and also denied existence of consent to suit

(R. 27-29). The defendants moved in May 1967 for summary judgment, attaching a copy of the administrative record (R. 32-33). The plaintiff filed a cross-motion for summary judgment (R. 118-119) and, after hearing, the motion of the plaintiff was granted (R. 131-137). This appeal followed.

The administrative record reveals the following facts: Walker's application, dated January 1964, stating his address as Yellow Pine, Idaho, claimed he was the original locator and sole owner of the Bobbin claim on Logan Creek (approximately 28 miles from Yellow Pine) which had, however, been tunnelled by others earlier; that he had fixed up a cabin and made improvements on the claim; that in 1955 he "got the old workings opened" and found the ore bodies too small and low grade to be economically workable; that he had found and staked a low grade gold-silver deposit high on the mountain, plus a high grade antimony deposit adjacent to it; and that he requested a five-acre fee patent because: "This is still the only home I own, (although lack of work in the area has forced me to be absent from it quite a bit, especially in the winter months) when I am someday able to put the big gold-silver deposit into production or the antimony, the Bobbin will have to be my base of operations and production will continue long after I am dead

and gone, and after all the work I have put into it I would like to see it go into the hands of my children eventually. This place is the only place I can return to and feel contented, as though I have really come 'home.'" Attached was a list of the work done and improvements made which, for the years 1957-1962, described only assessment work, "cat work on road" or "road grader on road," to a total of no more than $127 in any one year (R. 36-39).

By decision dated May 14, 1964, the Land Office manager rejected the application, his decision stating (R. 46):

> The Forest Service reports that for the most part the statements made by the applicant are correct. However, they do not agree that the cabin on the claim has been a principal place of residence since 1950 for the applicant. They report that Mr. Walker resides in Vale, Oregon most of the year and for a two or three month period in the summer, resides in the Yellow Pine - Big Creek area. When working in the Big Creek area he resides in the cabin on the claim, and when working in the Yellow Pine area he resides on property he owns at the town Yellow Pine. The District Forest Ranger of the Big Creek District of the Payette National Forest contends that Mr. Walker's principal place of residence when he is in the "back country" is at Yellow Pine rather than on the Bobbin mining claim.
>
> Since Mr. Walker's principal place of residence is at Vale, Oregon and for two or three months of the year is at Yellow Pine, Idaho he is not a qualified applicant under the Act of October 23, 1962. For this reason the application is rejected.

The detailed report of the Forest Service ranger made in March 1964 indicated that Walker lived on the claim no more than six months in the six years preceeding 1964 (R. 77-81). A report was also made by the mining valuation engineer, dated December 16, 1963, who, together with the District Ranger, had visited the claim in August 1963 to determine the validity of the mining claim at the request of the Forest Supervisor's office. This report stated that Walker was contacted at the time and that (R. 80):

> Mr. Walker asked for information regarding the mining claims occupancy act of 1962 (P.L. 87-851). I gave Mr. Walker all information I had regarding the act and advised him to contact the Bureau of Land Management in Boise for further information. Mr. Walker has contacted officials of the BLM, but has not yet made application under the act.

Walker appealed by letter received May 20, 1964. He claimed that the Act does not say "the" principal place of residence but rather "one of the" principal places of residence and that the area was snowed in seven to eight months of the year. He spoke of improved mining prospects and said (R. 50):

> I can furnish favorable recommendations by mining engineers on this property, and have since uncovered a very good silver vein with a width of eleven feet on this same property which will make a mine of itself if its values hold up for a good distance along the strike of the vein.

While admitting that he owned two lots at Vale, he denied living there and said (R. 50-52):

> When lack of income in the mining area of Big-Creek-Yellow Pine, Idaho forced me to seek other means of income to supplement, I began to bid on small contract jobs about the country, and I have had several contracts with the Bureau of Land Management in Oregon, with the district office being at Vale, Oregon. In fact the Saturday before last, the 9th of May 1964, I finished up my last contract with them. When working with the Vale BLM district I usually maintain a Vale forwarding address to which my mail is forwarded from Yellow Pine, Idaho. In the last few years when winter shut everything off in the Big Creek-Yellow Pine area my forwarding address has been wherever I found work in the winter months, such as, Payette, Idaho, Boise, Idaho, Vale, Oregon, even McDermitt, Nevada for a short time.
>
> * * * * *
>
> I have never resided on property I own at Yellow Pine, Idaho. I have owned a small piece of ground there for about two years, but it has had no dwelling on it nor have I pitched a tent on it or ever resided on it. There is no water on or near it and poor prospects of getting water without great expense. I have rented a cabin off and on at Yellow Pine for my use when working in the area, and last year had the use of teacherage as living quarters. Probably I will have the use of the teacherage again this year when I am in that area. <u>It is true as stated by the Forest Service that I am at Yellow Pine more than at the mining claim</u>, but false that I am residing on my own property. I have put a small oil storage shed on the property and am putting a building on it for a

> storage building, but there is no domicile on it. The post office at Big Creek was removed some years ago, and it is necessary that I have fairly good mail service because of my contracting business and so had to make Yellow Pine, Idaho, the nearest post office to the Big Creek area a business headquarters. When I can maintain enough mining and contracting activity in the Big Creek area to dispense with outside work I can get by with what mail service there is, and possibly an increase in mining there would bring the return of the post office.
>
> The essence of what I am saying is that I have two principal places of residence. The mining claim in question and Yellow Pine, Idaho. Otherwise my forwarding addresses are wherever outside work temporarily takes me. I stated in my application for patent and I now restate, the dwelling upon the claim is the only home I own.

Further inquiry of the Forest Service led to a report of March 4, 1965, which stated (R. 65):

> As Mr. Walker has stated, his improvements on the Bobbin mining claim are used only in connection with performing annual assessment and development work on his nearby claims and while doing some assessment work for others in the general area. Ranger Dodds has been on the Big Creek Ranger District the past seven years, and he reports that during that period Mr. Walker has spent only two or three months a year in the Yellow Pine-Big Creek area. During these periods, as stated in his appeal, Mr. Walker's residence has been mostly in Yellow Pine for business reasons.

By opinion of April 27, 1965, Walker's appeal was rejected on the ground that he had not shown satisfaction of the residence requirements of the Act. As to hearing, this opinion said (R. 68):

> The appellant indicates he would "welcome" a hearing. However, there is no statutory or regulatory requirement for a hearing in cases involving a determination of the type here, and the appellant has not been limited in his right to submit evidence substantiating his assertions.

Walker appealed to the Secretary, claiming that there was an issue of fact and that the Forest Service was guilty of bearing false witness. Again reviewing some of the facts, he said (R. 71):

> Last fall I brought out a large mill sample of ore from one of my two nearby properties and the mill test results are very favorable, consequently as money will permit I will be pushing this property into production as soon as possible. This means that even if a steady source of outside work doesn't become available in the area I will eventually have my independent livlihood there. It has become my opinion that the Forest Service is trying to hamper all mineral development within the National Forests.

Also, he stated (R. 72):

> P.S. Enclosed is an article by the Geological Research naming antimony deposits of note, among which is mentioned my property which I am developing towards production, on Logan Creek.

Attached were affidavits that Walker had sold his lots in Vale, Oregon, in 1964; that he had not voted there in the last five years (R. 74); and that Walker was a voting resident of the Big Creek-Yellow Pine area (R. 75).

The rejection was affirmed on April 27, 1965 (R. 85-91). All of the facts were examined in detail. It ruled that the term "principal place of residence" in the 1962 Act did not have a fixed judicially established meaning; that whether the mining claim was a principal place of Walker's residence required interpretation of the law and that "it does not appear that there is presently any dispute as to a material fact which would warrant the granting of a hearing" (R. 87). The decision then discussed the facts bearing on the question at some length and concluded that Walker had failed to show the required residence continuously for seven years prior to 1962. After referring to the purposes and legislative history of the Act, the decision concluded (R. 91):

In other words, the purpose of the law is to preserve homes for qualified occupants of mining claims, places where they have lived for years and from which their forced removal because of the invalidity of the mining claims would be a real hardship. There was no solicitude expressed by the Congress for the person who has a home elsewhere and who merely occupied the mining claim on a limited basis or for a limited purpose. Such a person would not be uprooted from a home if denied the right to occupy the claim.

When viewed in this light, appellant's own showing fails to establish that his cabin on the claim was a principal place of residence within the meaning of the statute. It indicates no more than that he occupied the cabin only when he was working on mining properties in the vicinity. When notso engaged and when conducting his principal work or, presumably, when not working at all, he lived elsewhere than on the claim. Denial of relief to him under the act would not work the hardship on him of removal from a long-established home.

SPECIFICATIONS OF ERRORS

The district court erred:

1. In assuming jurisdiction of the case.

2. In overturning the decision of the Secretary of the Interior.

3. In holding that the plaintiff was entitled to a hearing.

4. In holding that the facts required a hearing.

5. In remanding the case to the Secretary of the Interior for further proceedings.

6. In denying defendants' motion for summary judgment.

7. In holding that a person invoking the Mining Claims Occupancy Act has rights comparable to those of a mining entryman or a homesteader.

SUMMARY OF ARGUMENT

I

A. The United States did not consent to this suit since the Administrative Procedure Act is not a consent to sue the United States in derogation of sovereign immunity nor is it a waiver of that immunity.

B. The District of Idaho, absent congressional consent, had no jurisdiction of the Secretary of the Interior since, like other cabinet officers, his official residence, for purposes of suit, is the District of Columbia.

C. The mandamus statute of 1962, 28 U.S.C. secs. 1361, 1391(e), consented, in a limited class of cases, to jurisdiction of federal district courts throughout the country over the Secretary of the Interior. That consent does not vest the district court with jurisdiction of this case, since there cannot, under any view, be said to be a duty, equivalent to a positive command, owing to the plaintiff.

II

There are several independent reasons why rejection of the Secretary's decision was not warranted in this case.

A. The 1962 Act was a pure gratuity passed to authorize the alleviation of hardship on some individuals who had established homes for years on invalid mining claims. The Secretary of the Interior was given complete discretion as to whether and to what extent, up to the statutory maximums, some equitable relief should be granted to deserving persons. The legislative history is explicit that such was the intention of Congress, the distinction between permissive and mandatory legislation being repeatedly made. Consequently, Walker does not possess any statutory right empowering him to challenge the Secretary's rejection.

B. Walker asserted throughout the proceedings a past and future purpose of use of the five acres sought as a base for mining explorations. This is entirely contrary to the purposes of the 1962 Act, which was designed not to promote mining activity, but to prevent eviction of residents from the homes, and which reserved minerals to the United States. Congress had no intent to enlarge the existing laws as to mining development, and use of the 1962 Act for such uses perverts its purposes. Moreover, in seeking national forest lands, Walker is subverting the purpose of the 1962 Act, which Congress intended should apply "only if it [the land] is not needed for further governmental purposes." 108 Cong. Rec. p. 19647.

C. The record fails to show occupancy as a residence for seven years prior to 1962 of the nature contemplated by the Act. Most of Walker's complaints against the administrative decisions concerned actions after 1962 and failed to show that he was to be evicted from a principal residence. It is plain that, regardless of reason, he had not resided on the claim for a substantial part of his time since 1955. At the very least, this administrative conclusion is supported by the facts and should not be overturned by the courts.

D. The direction of a hearing was not justified. There is no right to hearing given in the statute. And a hearing would be pure formality, since the evidential facts are un-disputed. Only the conclusion whether the claim was a principal place of residence within the meaning of the 1962 Act is debated.

ARGUMENT

I

THE DISTRICT COURT HAD NO JURISDICTION OF THIS CASE

This suit originally named only the United States as defendant and asserted that jurisdiction rested in the Administrative Procedure Act and 28 U.S.C. sec. 1346 (R. 5). The Secretary of the Interior was added as a defendant by amendment but no change was made to the allegation of jurisdiction (R. 23-24). The district court said that plaintiff "is seeking this review" pursuant to the Administrative Procedure Act (R. 132) and that (R. 133): "The defendants contend that the court is limited in regard to reviewing decisions of the Department of the Interior. The Ninth Circuit has rejected the defendants' contention. Adams v. Witmer, 271 F.2d 29 (9th Cir. 1958); Coleman v. United States, 363 F.2d 190 (9th Cir. 1966)."

A. The United States has not consented to this suit. - There is no general form of action, common law or statutory, "for judicial review" of actions or decisions of agencies of the United States. Congress has never granted a consent to sue the United States as to all matters which may be characterized as agency action. The expression "judicial review," simply means that, in particular classes of cases under various specific authorizations or in particular modes in common law actions by which questions may arise, the courts have jurisdiction to go behind, or re-examine the actions that have been taken by a federal agent to a greater or lesser extent, depending on the case. Authority of the court to do so depends in each case on common law principles or authorization by Congress. Sovereign immunity is the basic common law principle, still applicable today, as recently recognized by Chief Judge Brown of the Fifth Circuit on March 26, 1968, when he said (Gardner v. Harris, F.2d):

> Blackstone said that the concept "that the king can do no wrong is a necessary and fundamental principle of the English constitution." Now in the 20th Century and in at least a part of the world long made safe for democracy the law persists in the view that seems to say that Blackstone is still right. And not even equity--the King's conscience--can help. As a result we must hold in this

case that a private citizen, deprived of his property right of access to the historic Natchez Trace because of barricades erected by the Federal Superintendent of that highway project, has no remedy in equity for their removal, since to permit the suit would be to allow the citizen to sue the federal government without its consent, thereby breaching the wall of sovereign immunity. Thus plaintiff's remedy, confined to one at law, is not available in this suit for equitable relief only and this action against the Superintendent must be dismissed. [Footnotes omitted.]

Footnote 3 stated:

With so much done, e.g., Suits in Admiralty Act, 46 U.S.C.A. §742; Public Vessels Act, 46 U.S.C.A. §782; Federal Torts Claims Act, 28 U.S.C.A. §1346; and more recently in 28 U.S.C.A. §§1361, 1391(e), to give the citizen access to a home-based Federal Court, frequently in cases that involve millions of dollars or which affect comprehensive governmental programs, the persistence with which the Government successfully asserts immunity as to property claims gives rise to several reactions. Not only does the result appear unusual to many, but the fact that Congress does not ameliorate these hardships appears even more unusual. The immunity is, however, very much alive. See Dugan v. Rank, 1963, 372 U.S. 609, 83 S.Ct. 999, 10 L. Ed. 2d 15; Malone v. Bowdoin, 1962, 369 U.S. 643, 82 S.Ct. 980, 8 L. Ed. 2d 168; Larson v. Domestic & Foreign Commerce Corp., 1949, 337 U.S. 682, 69 S.Ct. 1457, 93 L. Ed. 1628.

Walker in this suit seeks not money damages, but equitable relief designed to give him rights in property of the United States. Like the Fifth Circuit in Gardner, this Court has recognized that the United States has not consented to such suits. State of California v. Rank, 293 F.2d 340 (C.A. 9, 1961), aff'd on reh., 307 F.2d 96 (1962), aff'd on this point, Dugan v. Rank, 372 U.S. 609 (1963). In White v. Administration of General Services Admin. of U.S., 343 F.2d 444 (1965), this Court said (pp. 445-446):

> The object of the appellants in the instant suit is to get the title out of the United States and into the appellants. A suit with such an objective is a suit for specific performance, regardless of what may be said in the complaint which initiates the suit. And, the title to the interest which the court is asked to order to be conveyed to the appellants being now in the United States, the order would have to be made against the United States. It follows that the United States would have to be a party to the suit.
>
> If the fact that the United States is not named as a party in the suit could be overlooked and, though not named, it were treated as the real party in interest, which it is, the suit would still have to be dismissed, because the United States has not consented to be judicially compelled to perform its contracts. From the beginning of its history, the United States asserted and maintained complete immunity from suit until

> Congress, by the Act of February 24, 1855, 10 Stat. 612, created the United States Court of Claims and gave consent for the United States to be sued for compensation for certain breaches of duty, one of which was breach of contract. The Act of March 3, 1887, 24 Stat. 505, 28 U.S.C. § 1346, conferred a partly parallel jurisdiction upon the United States District Courts. Those statutes have never been regarded as having given consent that the United States could be ordered by a court to specifically perform a contract.

After referring to several decisions concerning sovereign immunity, including Larson v. Domestic & Foregin Corp., 337 U.S. 682 (1949), it continued (p. 446):

> * * * In our case, if the appellants are given the relief which they seek, the appellees will have to sign the name of the United States of America to a deed conveying an interest in land. No one can do that as an individual. When considered in relation to the Larson opinion, the instant case is an *a fortiori* case.
>
> Even the dissenting Justices in Larson would have decided the instant case as we decide it. * * *

In United States v. Sherwood, 312 U.S. 584 (1941), the Court said (p. 588) that the jurisdiction of the Court of Claims "is confined to the rendition of money judgments in suits brought for that relief against the United States" and (p. 591) that the Tucker Act jurisdiction to adjudicate claims against the United

States "does not extend to any suit which could not be maintained in the Court of Claims."

The district court relied upon the Administrative Procedure Act and upon the Adams and Coleman cases, supra. Neither case supports a theory of consent of the United States to suit. Coleman, which is now awaiting decision by the Supreme Court, was brought by the United States and, on rehearing in this Court, the Secretary of the Interior was joined as a party under the 1962 mandamus statute, 28 U.S.C. secs. 1361, 1391(e). The United States was not a party to Adams.

In White, supra, this Court held (343 F.2d at p. 447): "We find nothing in the statutes relating to declaratory judgments or administrative procedure which is helpful to the appellants." Chournos v. United States, 335 F.2d 918, 919 (C.A. 10, 1964) declared:

> The Administrative Procedure Act, 5 U.S.C. § 1001 et seq., does not purport to give consent to suits against the United States. The Act provides that the person suffering legal wrong because of any agency action, or who is adversely affected or aggravated by such action, shall be entitled to judicial review. This review may be obtained only by an appropriate action in "any court of competent jurisdiction." Such an action may not be maintained if the court lacks jurisdiction upon any ground. [Footnotes deleted.]

The Eighth Circuit has recently concurred. Twin Cities Chippewa Tribal C. v. Minnesota Chippewa Tribe, 370 F.2d 529 (1967). It dismissed a suit against an Indian tribal corporation and the Secretary of the Interior for lack of jurisdiction, saying (p. 532):

> Secondly, plaintiffs assert that the District Court has jurisdiction over the Secretary of the United States Department of the Interior by virtue of § 10 of the Administrative Procedure Act, 5 U.S.C.A. § 1009, 5 F.C.A. § 1009. The alleged "agency action" is assertedly found in 25 U.S.C.A. § 476, 25 F.C.A. § 476, which provides in part as follows: "Amendments to the constitution and bylaws may be ratified and approved by the Secretary * * *." (Emphasis supplied.) This reliance on § 10 of the Administrative Procedure Act to establish jurisdiction below is misplaced. Section 10 of the Act does not confer jurisdiction upon the federal courts. Its purpose is to define the procedures and manner of judicial review of agency action rather than confer jurisdiction. Ove Gustavsson Contr. Co. v. Floete, 278 F.2d 912, 914 (2nd Cir. 1960); Barnes v. United States, supra. Additionally, § 10 does not in itself amount to congressional consent to a suit against defendants, whose right to assert the defense of sovereign immunity is discussed above. Chournos v. United States, 335 F.2d 918 (10th Cir. 1964).

Accord Cyrus v. United States, 226 F.2d 416, 417 (C.A. 1, 1955); Aktiebolaget Bofors v. United States, 194 F.2d 145, 149 (C.A. D.C. 1951).

As these cases show, the A.P.A. does not purport to grant federal courts jurisdiction over any case, nor to consent

to suit against the United States in any form. Instead, it refers to "any applicable form of legal action * * * in a court of competent jurisdiction." 5 U.S.C. sec. 703. There is no room for construing this language as a waiver of sovereign immunity from suit, especially when the problem is approached in context of the facts that waivers of immunity have been intentional, specific and partial only and are accomplished by statutes consenting to suit which designate the terms upon which and the manner in which relief can be obtained against the United States. The restrictions upon consent limit the jurisdiction of the courts and cannot be waived, e.g., Dugan v. Rank, supra; Munro v. United States, 303 U.S. 36 (1938); Soriano v. United States, 352 U.S. 270, 273-274 (1957); Edwards v. United States, 163 F.2d 268 (C.A. 9, 1947). United States v. Sherwood, 312 U.S. 584 (1941), held that nothing in the Federal Rules of Civil Procedure constituted a consent to sue the United States, emphasizing the rule that "the terms of its [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit" (p. 586) and that the "consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted" (p. 590).

The principal appellate holding that the Administrative Procedure Act was a consent to suit is Estrada v. Ahrens, 296 F.2d 690 (C.A. 5, 1961), which did not deal with the language of the Act itself and that case represented the belief of the Fifth Circuit (296 F.2d at p. 698) that "The doctrine [of sovereign immunity] is wearing thin. Recent years have witnessed a great expansion of the individual's rights to seek redress against the government for wrongs committed by it." About a year earlier, the same Circuit had rejected the defense of sovereign immunity in Bowdoin v. Malone, 284 F.2d 95 (C.A. 5, 1960).

But the Fifth Circuit was shown the error of its position when, a year after Estrada, Bowdoin was reversed, Malone v. Bowdoin, 369 U.S. 643 (1962), and as noted above, it now recognizes, albeit reluctantly, its misconception of the law. Mulry v. Driver, 366 F.2d 544 (C.A. 9, 1966), was not brought against the United States but found "the necessary consent of the United States" under the A.P.A. (p. 547). It made no attempt to explain why Congress should be deemed to have reached the result (which is, so far as we know, completely novel in the law) of "consenting" to a suit to which the United States would not be

a party. The opinion actually does not discuss court jurisdiction but rather scope of review of administrative decision. And all of the discussion is dictum, since the court agreed that the action of the district court in dismissing the action was right.[1/]

B. Except for the 1962 mandamus statute the district court had no jurisdiction over the Secretary of the Interior. - In Ernst v. Secretary of the Interior, 244 F.2d 344 (C.A. 9, 1957), this Court, in summarily affirming, held that the Secretary of the Interior and the Solicitor of that Department could not be sued outside the District of Columbia, saying (pp. 345-346):

> The order to quash and dismiss the case as against the Secretary and the Solicitor was clearly correct inasmuch as the court lacked jurisdiction of those officers. Their official residence is in Washington, D. C. The governing statute (28 U.S.C.A. § 1391(b) provides that "a civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law." There is no statutory authority for instituting suit against these officials elsewhere than in their place of residence.

1/ Since this was the action taken, further review on any issue of effect of the A.P.A. was not available.

This was applying well-settled law. Martinez v. Seaton, 285 F.2d 587 (C.A. 10, 1961). In Ernst, the district court had said (see record of Ernst in the files of this Court):

> The Secretary of the Interior and the Solicitor of the Department of the Interior have appeared specially by the United States Attorney and moved the court for an order quashing the return of service of summons and dismissing the complaint, upon the grounds that these Government officials are residents of the District of Columbia and such action can be brought against them only in the district of their official residence.
>
> Jurisdiction to review such decision could only be conferred by the provisions of Sec. 10 of the Administrative Procedure Act, Title 5, Sec. 1009, U.S.C., upon which plaintiff relies. This statute provides for judicial review of "agency action" of any administrative authority or agency of the United States, which proceeding, in the absence of any specific statute, may be brought "in any court of competent jurisdiction". It is well settled that any action under the provisions of this Act against a public official of the United States in his official capacity can only be maintained at the official residence of such official, within the meaning of Title 28, Sec. 1391, U.S.C.A. Blackmar vs. Guerre, 342 U.S. 512, 516; Trueman Fertilizer Co. vs. Larson, (CCA 5), 196 F.2d 910; Nesbitt Fruit Products Inc., vs. Wallace, 17 F.Supp. 141; Torres vs. McGranery, 111 F.Supp. 241; Muerer vs. Ryder, 137 F.Supp. 362; Clement Martin vs. Dick Corp., 97 F.Supp. 961.
>
> Compare Wilson vs. United States Civil Service Commission, 136 F.Supp. 104, and Kansas City Power and Light Co. vs. McKay, 225 F.2d 924, where

> actions to review agency decisions were properly in the U.S. District Court for the District of Columbia. In the Kansas City Power case the court expressly holds that the Administrative Procedure Act does not of itself establish the jurisdiction of the Federal Courts over an action not otherwise cognizable by them, or does not render competent a court which lacks jurisdiction upon any other ground (p. 933).
>
> As the official residence of the Secretary of the Interior and the Solicitor of the Department of the Interior was and is in the District of Columbia this action cannot be maintained against them in this District. See cases above cite, and Anno. Title 28, Sec. 1391, U.S.C.A., note 49.

The Supreme Court, in Blackmar v. Guerre, 342 U.S. 512, 515-516 (1952), stated:

> It is further suggested that judicial review is authorized by the Administrative Procedure Act, 5 U.S.C. & 1001 *et seq*. Certainly there is no specific authorization in that Act for suit against the Commission [the Civil Service Commission] as an entity. Still less is the Act to be deemed an implied waiver of all governmental immunity from suit. If the Commission's action is reviewable under § 1009, it is reviewable only in a court of "competent jurisdiction." [Footnotes deleted.]

Under these authorities, the district court lacked jurisdiction over the Secretary of the Interior.

C. The mandamus statute of 1962 did not vest the district court with jurisdiction to review actions taken under the Mining Claims Occupancy Act of 1962. - Congress in 1962 very

carefully limited the scope of the jurisdiction that it was vesting in courts outside the District of Columbia.

The 1962 Act is explicit in granting the district courts jurisdiction of any action "in the nature of mandamus to compel an officer or employee of the United States or an agency thereof to perform a duty owed to the plaintiff." It does not vest the courts with general jurisdiction to review decisions of such officers. The meaning of "mandamus" is made crystal clear by the committee reports to both Houses of Congress, which described the grant of jurisdiction as follows (2 U.S. Cong. News, 87th Cong., 2d sess. (1962) 2785):

> This legislation does not create new liabilities or new causes of action against the U.S. Government. The bill, as amended, is intended to facilitate review by the Federal courts of administrative actions. To attain this end, the bill does two things. First, it specifically grants jurisdiction to the district courts to issue orders compelling Government officials to perform their duties and to make decisions in matters involving the exercise of discretion, but not to direct or influence the exercise of the officer or agency in the making of the decision. Secondly, it broadens the venue provisions of title 28 of the United States Code to permit an action to be brought against a Government official in the judicial district (1) where a defendant resides, or (2) in which the cause of action arose, or

> (3) in which any real property involving the action is situated, or (4) if no real property is involved in the action, where the plaintiff resides. This bill will not give access to the Federal courts to an action which cannot now be brought against a Federal official in the U. S. District Court for the District of Columbia.

The use of the term "mandamus" in the committee report and in the Act was intentional for the exact purpose of not expanding the scope of review of administrative decisions. It was written in response to a recommendation of the Department of Justice (Id. 2788-2789), as follows:

> While the stated purpose of section 1 is to extend the mandamus powers of the District Court for the District of Columbia to the several district courts throughout the Nation, the language of the section is dangerously broad. Courts interpreting the mandate to require a Federal officer "to do his duty" might find a much greater power intended than the existing mandamus power in the District of Columbia court to which the proposed statute does not refer explicitly or implicitly. We think it essential that the section refer to the "mandamus" power and specifically limit its exercise to ministerial duties owed the plaintiff. Should the language be applied to discretionary acts of Federal officers, the judicial branch would be invading the executive or legislative function in violation of the doctrine of separation of powers. Clearly, the judiciary can compel executive action (or legislative action) only where there is an absolute obligation to act in connection with which no discretion exists.

Limitation of the 1962 Act to ministerial duties was recognized in Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (C.A. 10, 1966), as follows (at p. 367):

> Historically, mandamus is an extraordinary remedial process awarded only in the exercise of sound judicial discretion. Before such a writ may issue, it must appear that the claim is clear and certain and the duty of the officer involved must be ministerial, plainly defined, and peremptory. Huddleston v. Dwyer, 10 Cir., 145 F.2d 311. The duty sought to be exercised must be a positive command and so plainly prescribed as to be free from doubt. Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 50 S.Ct. 320, 74 L.Ed. 809.

The nature of mandamus was declared in the early case of Decatur v. Paulding, 14 Pet. 497 (1840), where the Supreme Court held that mandamus could not be awarded to compel the Secretary of the Navy to allow a claim, under one construction of a resolution of Congress, which he had disallowed under another construction. Chief Justice Taney, speaking for the Court, said (14 Pet. at p. 514):

> The duty required by the resolution was to be performed by him, as the head of one of the executive departments of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of congress, or by resolution, are not mere ministerial duties. The head of an

> executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of congress, under which he is, from time to time, required to act.

This rule, especially as applied to public land matters, is sustained by a long and unbroken line of authorities. Litchfield v. Register and Receiver, 9 Wall. 575 (1869); Riverside Oil Co. v. Hitchcock, 190 U.S. 316 (1903); West v. Hitchcock, 205 U.S. 80 (1907); Ness v. Fisher, 223 U.S. 683 (1912); Alaska Smokeless Coal Co. v. Lane, 250 U.S. 549 (1919); Hall v. Payne, 254 U.S. 343 (1920); Work v. Rives, 267 U.S. 175 (1925); Wilbur v. United States, 281 U.S. 206 (1930); United States v. Wilbur, 283 U.S. 414 (1931).

The function of the writ of mandamus was summarized in Wilbur v. United States, 281 U.S. 206 (1930). There, Mr. Justice Van Devanter, speaking with his usual precision, said (at pp. 218-219):

> Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.

> The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.

Here it very clearly cannot be said that the Mining Claims Occupancy Act of 1962 imposed on the Secretary of the Interior any such ministerial duty to grant any rights in the public domain to Walker or to grant him any kind of a hearing on the subject.

II

REJECTION OF THE DEPARTMENTAL DECISION WAS NOT WARRANTED

A. Congress did not confer upon Walker a litigable right to claim an interest in the public domain. - The district court said (R. 133):

> When a person enters upon the public lands of the United States, whether as a locator of a mining claim, as a homesteader, or as one asserting rights under any of the many laws governing

> entries on public lands, such as the Mining Claim Occupancy Act, and such person perfects his entry by compliance with the applicable Act of Congress he then acquires a right which the Administrative Procedure Act is designed to safeguard from arbitrary, capricious and illegal action of executive and administrative agencies. Coleman v. United States, 363 F.2d 190 (9th Cir. 1966); Adams v. Witmer, 271 F.2d (9th Cir. 1958).

This is not true here. The Mining Claims Occupancy Act is of an entirely different nature than ordinary mining or homesteading laws. An entry under that Act was precluded by the fact that it applied only to persons who had taken action continuously for at least seven years prior to the Act.

In short, the 1962 Act simply authorized the Secretary of the Interior to recognize equities of some persons who were and had been trespassers on the public lands for some years in the past. The language of the Act was designedly chosen by Congress to give the Secretary complete discretion to recognize equities to the extent he deemed appropriate. We elaborate.

The Act resulted from the fact that, for various reasons, hundreds of mining claims had "been used, sometimes for generations, as actual homesites, and as a principal place of residence, by families which have inherited them from original locators or paid value for the improvements, in reliance upon

the customs prevailing in the area that effective title could be obtained by gift, inheritance, or quitclaim deed" but were, in fact, not now used for mining and were invalid for various reasons. Attention was focused on these trespassers on the public domain upon passage of the Multiple Use Act of 1955, 69 Stat. 367, 30 U.S.C. secs. 601-615. That Act was designed, *inter alia*, to correct the widespread abuse of the mining laws by the use of mining locations for nonmining purposes. It provided (30 U.S.C. sec. 612(a)) that mining claims thereafter located should not be used for other than mining purposes and it contemplated stricter enforcement of the mining law limitations.[2] The 1962 Act was passed to alleviate the hardship resulting from such enforcement.[3] But the extent of relief and the persons entitled were strictly limited and complete discretionary authorization was given to the Secretary of the Interior (together with the heads of other executive agencies using particular lands). The basic provision of Section 1 is that the

---

2/ That Act also excluded from the operation of the mining laws common varieties of materials, such as sand, stone, etc.

3/ In 1962, the Senate Report (No. 1984, 87th Cong., 2d sess., p. 4) said that the 1955 Act "has resulted in an intensified program to eliminate uses of mining claims inconsistent with mining purposes."

Secretary "may convey * * * an interest, up to and including a fee simple, in and to an area of not more" than five acres "but no more than is occupied by the claimant." The Secretary was then given complete freedom to select the quality of title-fee, life estate, 10 year lease, and/or the quantity of land to be given. Possible beneficiaries--"qualified applicants"--are (1) a person in residential occupation in October 1962 of (2) improvements which constitute for him a principal place of residence and (3) of which he or his predecessors in interest were in possession for not less than seven years prior to 1962, i.e., when the 1955 Act became effective. The statute again used "may" on Section 3 dealing with land used by some other government unit, here the Forest Service. The Secretary was authorized to fix a price of the interest to be conveyed, excluding value of improvements placed on the land by the beneficiary or his predecessors, and in doing so to take into consideration any "equities of the applicant." Mineral interests in lands conveyed were reserved for the period of the conveyance. The Act was permissive in every aspect.

The discretion of the Secretary was emphasized in Congress. Thus, the Senate Committee said the objective was "to give the Secretary of the Interior a full kit of legal tools

and the discretion, when the public interest will not be injured, to permit persons who live on mining claims for residential purposes * * * to continue to reside in their home." S. Rept. No. 1984, 87th Cong., 2d sess. (1962) p. 3. The discretionary function was explained by Senator Church, the sponsor of S. 3451, which eventually became the Act of October 23, 1962, as follows (Hearings, S. Committee on Interior and Insular Affairs, S. 3451, 87th Cong., 2d sess. (1962) p. 16):

> * * * the bill is meant to be * * * discretionary. It says at the very first sentence of the bill that the Secretary of the Interior <u>may convey</u> to any occupant. The purpose of that language was to convey the necessary discretion and not to make it mandatory so that it would be applicable in cases where it is not justified. (Emphasis supplied.)

See also <u>Id.</u>, pp. 17-19. At page 30 of the hearings, Senator Church said:

> We do want to leave the departments free to make the proper determination in any given case. So we have written this in discretionary terms.

The complete discretionary authority is even more clearly stated in the debates in the House. Mr. Aspinall, the sponsor, opened discussion by saying the bill "is designed to

arm the Secretary of the Interior with discretionary authority in order to prevent hardship * * *." 108 Cong. Rec. 19645. Mr. Johnson of California emphasized: "Mr. Speaker, this is permissive legislation" (Id., p. 19647). Mr. Dingell of Michigan opposed the legislation on the ground it was a give-away of public land, and Mr. Johnson responded: "Does not the gentleman agree that the legislation is permissive?" (Id., p. 19649). After further discussion, Mr. Dingell advanced the argument that "while this measure masquerades as permissive it will in fact be nearly mandatory in effect because of political and other pressures" (Id., p. 19649). Mrs. Pfost, sub-committee chairman, in listing the protections to the public interest, contained in the bill, said: "Secondly, the authority is discretionary and the Secretary of the Interior may determine that disposition is not in the public interest" (Id., p. 19650).

Moreover, statutes, such as this one, constituting donations, gifts or bounties, are strictly construed in favor of all the public represented by the Government. District of Columbia v. Johnson, 165 U.S. 330, 339 (1897); cf. Pine Hill Co. v. United States, 259 U.S. 191 (1922). Analogous is the principle "that land grants are construed favorably to the Government,

that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it. Caldwell v. United States, 250 U.S. 14, 20-21." United States v. Union Pacific R. Co., 353 U.S. 112, 116 (1957). See also Great Northern Ry. Co. v. United States, 315 U.S. 262, 272 (1942), United States v. Oregon &c. Railroad, 164 U.S. 526, 539 (1896).

All of these considerations demonstrate that the statute should be read to mean what it says, i.e., that some interest in the public domain can be given to Walker only if the Secretary of the Interior so concludes. Walker is not given any right to such a grant, nor are the courts authorized to re-examine the Secretary's refusal to make a grant.[4/] This is, we submit, a much clearer case than that involved in Ferry v. Udall, 336 F.2d 706 (C.A. 9, 1964), where this Court held that a refusal of the Secretary to sell land under the Isolated Tracts Act "is not subject to judicial review" because the Act committed the discretion to sell to the Secretary.

4/ Thus, even if the Administrative Procedure Act were thought to apply, the exclusion when "agency action is committed to agency discretion by law," 5 U.S.C. sec. 701(a) precludes the granting of any relief in this case.

B. Walker's expressed purpose for use of the property is contradictory to the congressional purposes in passing the 1962 Act. - Throughout the administrative process, Walker asserted a desire to secure this land as a base for future mining operations. He said that "Bobbin will have to be my base of operations" and emphasized prospective gold, silver or antimony deposits in the vicinity. His first appeal devoted a major portion of its space to expression of his intent of developing mining prospects in the area (R. 50). His appeal to the Secretary repeated this theme and he charged that the Forest Service "is trying to hamper all mineral development within the National Forest" (R. 71).

The 1962 Act was not designed to promote mineral development to any extent or to enlarge other laws designed for that purpose. On the contrary, the conveyance of any minerals under the Act was prohibited. Section 7. The Act applied only to cases where the mineral interest was shown not to exist or to have been worked out. It was designed solely to protect persons from eviction from homes used for residential purposes. Walker, in attempting to subvert these purposes, is doing the very thing that the 1955 Act was passed to prevent, pursuant to

a policy re-affirmed in the 1962 Act. Walker's complaint about the policy of the Forest Service likewise contradicts the congressional understanding, which was that the 1962 Act was simply giving a priority of old time residents for land "only if it is not needed for further governmental purposes." 108 Cong. Rec. p. 19647. Congress very plainly approved the program of "both the Bureau of Land Management and the U.S. Forest Service [which] have initiated programs designed to eliminate unauthorized use of unpatented mining claims * * *." 108 Cong. Rec. p. 19648. It was also expressly stated "this proposed legislation would in no way amend the public mining laws." 108 Cong. Rec. p. 19647.

Thus, the 1962 Act was not designed to give Walker a base from which to conduct mining prospecting on surrounding property. Since that was his purpose, his application had to be rejected.

C. <u>The departmental rejection of Walker's application was fully supported by the facts</u>. - In the Statement, <u>supra</u>, we have narrated at some length all of the facts appearing in this case, including those claimed by Walker. In saying "principal place of residence," Congress was not using a word of art, nor

a technical legal term, like domicile. Rather, it was describing a home from which, in equity, some people should not be evicted. The departmental conclusion that Walker had not shown the cabin to constitute such a residence was a supportable, if not inevitable, conclusion from the facts. In this connection, it is important to remember that the controlling fact that Walker was obliged to establish in order to support his application was continuous residence of that nature for the seven years prior to 1962, i.e., since 1955. The original application is, to say the least, very sketchy as to that period but it admits residence at many other places wherever Walker's work took him. His additional assertions on appeal added little to proof of pre-1962 residency and were primarily addressed either to his mining intentions or to his post-1962 actions. He said: "It is true as stated by the Forest Service that I am at Yellow Pine more than at the mining claim * * *" (R. 51). He also seems to have had the concept that proof that he did not have a residence elsewhere proves he had a home at the Bobbin claim. Cf. R. 71. This negative inference does not follow. The conclusion is plain, we submit, that rejection of Walker's claim will not result in what Senator Church referred to as the "rather harsh

circumstances of being forced out of this homesite. If they are required to leave their modest home, they will have no place to go." Hearings, S. Comm. on Interior and Insular Affairs on S. 3451, 87th Cong., 2d sess. (1962) pp. 11-12. The bill was designed "to give relief to people in California who were threatened with eviction from their homes * * *." 108 Cong. Rec. p. 19646.[5/] The basic fact is plain that Walker lived at the Bobbin claim only when attempting to develop mining locations in the area. He did not occupy it as his general residence and there is no question of evicting him.

D. The order directing a hearing was unwarranted. - Two reasons why the directing of a hearing was not justified are (1) there is no obligation upon the Secretary to direct a hearing in such a case and (2) under the undisputed facts a hearing would be a mere formality. A requirement of a hearing in cases such as this would impose a serious impediment upon and would tend to disrupt and delay the administrative process. In Best v. Humboldt, 371 U.S. 334 (1963), the Court noted (fn. 8, p. 339) the burden that processing of mining claims alone

---

5/ This referred to the original bill which related only to California but was expanded to be generally applicable.

imposes upon the nine hearing examiners assigned to such cases. Reports were made in this case in 1963 and 1964 by Vernon Dow, Valuation Engineer (Mining), by Earl Dodds, District Ranger (R. 76-80), and by Floyd Iverson, Forest Supervisor in 1965 (R. 65). Walker submitted the affidavit of the Sheriff of Valley County, Idaho (R. 75). A plenary hearing obviously would require some time of the hearing examiner to schedule, hold and report upon and would divert government employees from their normal duties for the time required. There is, we submit, no justification for such impedence of the normal activities of government personnel. In Ferry v. Udall, 336 F.2d 706, 714 (C.A. 9, 1964), cert. den., 381 U.S. 904, an attack upon rejection of an application under the Isolated Tracts Act for lack of hearing failed, this Court saying, "We know of no provision in the Isolated Tracts Act that requires such a hearing. Furthermore, there is no constitutional requirement to a right to a hearing where only a potential privilege to purchase United States land is involved."[6/] Cf. LaRue v. Udall, 324 F.2d 428 (C.A. D.C. 1963

6/ This is in accord with Webster Groves Union Trust Company v. Saxon, 370 F.2d 381, 385 (C.A. 8, 1966), that: "We do not think that the Administrative Procedure Act imposes any requirement of an adversary hearing before an agency, but that it only specifies the procedure to be followed when a hearing is required by some other statute."

cert. den., 376 U.S. 907. This reasoning equally applies here. 43 C.F.R. sec. 1843.5 (R. 135) is purely discretionary and does not establish a right to a hearing. Even though its order directed a hearing, the district court recognized (R. 135) that the regulation "permits a hearing on an issue of fact, if the Secretary within his discretion sees fit to grant a hearing."

Moreover, a hearing is not required when it would serve no useful purpose. Dredge Corporation v. Penny, 362 F.2d 889 (C.A. 9, 1966). So here, the detailed facts are known and there is no dispute about them. Clearly, a hearing is not necessary simply to have the witnesses express opinions whether or not those facts show existence of a principal place of residence for the years 1955 to 1962. The problem is one of drawing the conclusion (whether it be called one of ultimate fact or law is immaterial), as to sufficiency of Walker's showing to justify equitable consideration for him. The directed hearing would, we submit, constitute pure waste of time and money.

CONCLUSION

It is submitted that the judgment below should be reversed with directions to dismiss the case.

Respectfully submitted,

CLYDE O. MARTZ,
Assistant Attorney General.

SYLVAN A. JEPPESEN,
United States Attorney,
Boise, Idaho, 83701.

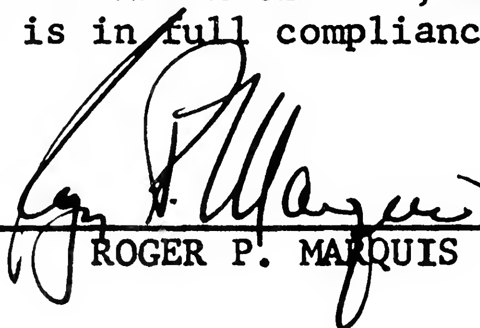
JAY F. BATES,
Assistant United States Attorney,
Boise, Idaho, 83701.

ROGER P. MARQUIS,
Attorney, Department of Justice,
Washington, D. C., 20530.

APRIL 1968

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



ROGER P. MARQUIS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFFORD PAUL WILTSIE, Appellant, vs. CALIFORNIA DEPARTMENT OF CORRECTIONS, et al., Appellees.	)	NO. 22380

APPELLEES' BRIEF

THOMAS C. LYNCH, Attorney General
of California

DERALD E. GRANBERG,
Deputy Attorney General

JOHN T. MURPHY,
Deputy Attorney General

6000 State Building
San Francisco 94102
Telephone: 557-1336

Attorneys for Appellees

FILED

MAR 2 2 1968

WM. B. LUCK CLERK

MAR 29 1969

TOPICAL INDEX

	Page
JURISDICTION	1
STATEMENT OF THE CASE AND OF THE FACTS	2
APPELLANT'S CONTENTION	5
SUMMARY OF APPELLEES' ARGUMENT	5
ARGUMENT:	
THE COMPLAINT IN THE DISTRICT COURT DID NOT STATE A CAUSE OF ACTION AND WAS FRIVOLOUS AND MALICIOUS	6
1. The District Court had Broad Discretion to Dismiss the Complaint and Did Not Abuse That Discretion	6
2. No Federal Constitutional Right was Violated by the Alleged Assault and Theft	8
3. The Allegations of the Complaint are Frivolous and Malicious	11
CONCLUSION	13
CERTIFICATE OF COUNSEL	13
STATEMENT OF SERVICE BY MAIL	

TABLE OF CASES

	Page
Agnew v. City of Compton, 239 F.2d 226 (9th Cir. 1956)	8
Allison v. Wilson, 277 F.Supp. 271 (N.D.Cal. 1967)	8
Cole v. Smith, 344 F.2d 721 (8th Cir. 1965)	10
Cullum v. Calif. Dept. of Corrections, 267 F.Supp. 524 (N.D.Cal. 1967)	8, 9
Fletcher v. Young, 222 F.2d 222 (4th Cir. 1955), cert. den. 350 U.S. 916 (1955)	8
Ford v. Wilson, 365 F.2d 831 (9th Cir. 1966)	6
Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961)	7
Roberts v. Barbosa, 227 F.Supp. 20 (S.D.Cal. 1964)	7, 11
Shobe v. People, 362 F.2d 545 (9th Cir. 1966)	6, 7
Smart v. Heinze, 347 F.2d 114 (9th Cir. 1965)	6
Spears v. United States, 266 F.Supp. 22 (S.D.W.Va. 1967)	12
Urbano v. Sondern, 41 F.R.D. 355 (Conn. 1966) Aff'd. 370 F.2d 13 (1966)	12
United States ex rel. Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956)	11
Weller v. Dickson, 314 F.2d 598 (9th Cir. 1963)	7, 11

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFFORD PAUL WILTSIE, Appellant, vs. CALIFORNIA DEPARTMENT OF CORRECTIONS, et al., Appellees.	)	NO. 22380

APPELLEES' BRIEF

JURISDICTION

The order of the United States District Court for the Northern District of California, dismissing appellant's complaint, in the proceeding entitled Wiltsie v. California Department of Corrections, et al., No. 46637, was issued July 31, 1967. Appellant, a prisoner in the California State Prison at San Quentin, alleged that his claim arose under Title 42, United States Code sections 1983 and 1985 (the Civil Rights Act), and sought the jurisdiction of the district court under Title 28, United States Code sections 1331 and 1343. The jurisdiction of this Court is invoked under Title 28, United States Code sections 1291 and 1915.

STATEMENT OF THE CASE AND OF THE FACTS

On March 3, 1967, appellant filed a civil complaint in the district court. The defendants were California Department of Corrections, Walter Dunbar (Director of the Department of Corrections), Lawrence E. Wilson (Warden of the State Prison), R. Wham (Associate Warden of the State Prison), C. B. McEndree (a Correctional Captain), C. E. Moody (a Correctional Lieutenant), Does One and Two (Correctional Sergeants), N. T. Smith (a Correctional Officer), Woodside (a Correctional Officer), and Does Three through Twenty-five (Correctional Officers). The complaint alleged that at noon on January 18, 1967, racial outbursts occurred within the prison, and that until about 7:30 p.m. appellant and other inmates were restricted to the waterfront area where they had been employed. On the next day, about 1:00 p.m., appellee McEndree announced over the prison public address system that appellee Moody would conduct a general search of all cells for weapons and contraband, and that inmates were expected to cooperate to insure an orderly and expedient search. Appellant was in his cell at 4:20 p.m. when he "yelled" to appellee Smith to turn on the lights. According to appellant, Smith replied, "You are not giving any orders, we are giving orders here."

Sometime between 6:00 and 8:00 p.m., Moody's search squad arrived at appellant's cell. The squad consisted of Moody, Does One through Twenty-Five and ten armed correctional officers. Appellant was ordered to undress, to leave his cell and to stand outside facing the gun walk, with his hands on a rail. At this point, according to appellant's complaint, Smith directed an obscenity at appellant and began beating him on "both sides of the head." Then Does Three and Four hit appellant with billyclubs on the shoulder and buttocks. Many officers joined in the beating including appellee Woodside and Doe Five. The alleged beating lasted "a matter of minutes" until Doe One ordered the officers to stop. Appellant was returned to his cell, only to be punched in the stomach by Doe Six. Doe Six then took an oil painting from appellant's cell. Appellant values the painting at $250.00.

On the next day, January 20, 1967, appellant says he displayed his bruises to "a member of the staff" and asked "M. T. A. Rogers" for medical attention. "M. T. A. Rogers" directed appellant to see the sergeant. On January 21, 1967, he asked an inmate hospital worker about a physician but was told that he could not see a physician until the prison was "back to its regular routine." On January 23 appellant saw a physician and then returned to his work assignment "whereat he has

reported daily thereafter."

In count one for the alleged beating administered, appellant seeks actual damages from each appellee in the amount of $100,000; punitive damages from each appellee in the amount of $150,000; and costs. This represents a total of $8,250,000. In count two for the alleged conspiracy to deny him his rights, appellant demands $100,000 from each defendant or $3,300,000. In count three for the alleged theft of the oil painting, appellant asks $5,000 in damages. In count four for alleged pain and suffering, appellant demands $50,000. In count five for alleged assault, appellant seeks $50,000 from each appellee or $1,650,000. His total claim for damages is $13,255,000.

On or about April 14, 1967, appellant on his own motion filed an amended complaint. He identified Doe One as T. Plant (a Correctional Sergeant), Doe Two as J. Cry (a Correctional Sergeant), Doe Three as K. J. Slee (a Correctional Officer), Doe Four as M. R. Stauts (a Correctional Officer), Doe Five as R. L. Brown (a (Correctional Officer) and Doe Six as R. O. Fehrenkamp (a Correctional Officer).

On April 28, 1967, appellees filed a notice of motion and motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure and Title 28, United States Code section 1915(d). On May 26, 1967, appellant

filed an opposition to the motion and on June 9, 1967, he filed an "affidavit" challenging the determination of the Marin County District Attorney's Office that the charges were unfounded. On July 31, 1967, the district court dismissed the complaint.

APPELLANT'S CONTENTION

The district court erred in granting appellees' motion to dismiss when appellant's complaint clearly set forth a violation of the Civil Rights Act.

SUMMARY OF APPELLEES' ARGUMENT

The district court had broad discretion to dismiss appellant's complaint and did not abuse its discretion. The district court, following the general rule, was without authority to interfere in the internal affairs of the prison, especially where the purpose of the complaint was to harass and intimidate those persons charged by state law with the administration of the prison and the maintenance of discipline. An alleged assault by a prison official, in and of itself, does not state a cause of action under the Civil Rights Act. Moreover, the complaint on its face was frivolous and malicious.

ARGUMENT

THE COMPLAINT IN THE DISTRICT COURT DID NOT STATE A CAUSE OF ACTION AND WAS FRIVOLOUS AND MALICIOUS

The gravamen of appellant's complaint is that he was assaulted by prison officers during a search of his cell which followed a prison uprising, and that during the course of this assault his oil painting was removed from his cell. The district court, accepting all of appellant's allegations as true, dismissed the complaint on the ground that relief was not warranted under the Civil Rights Act. This decision was manifestly correct.

1. The District Court had Broad Discretion to Dismiss the Complaint and Did Not Abuse That Discretion.

The district court's discretion to deny a state prisoner the privilege of prosecuting a civil rights complaint is especially broad in an action against the agency which administers the state prisons, its director, and the warden and other officials of the institution in which the prisoner is incarcerated. Ford v. Wilson, 365 F.2d 831 (9th Cir. 1966); Shobe v. People, 362 F.2d 545, 546 (9th Cir. 1966); Smart v. Heinze, 347 F.2d 114, 116 (9th Cir. 1965). The reasons for such broad discretion are that it would be disruptive of prison discipline to permit such civil suits to proceed while the plaintiff is still in custody, and that the maintenance

of such suits in federal courts would produce unseemly conflict between federal courts and state authorities. Weller v. Dickson, 314 F.2d 598, 601 (9th Cir. 1963); Shobe v. People, supra, 362 F.2d 545, 546 (9th Cir. 1966).

The general rule is that the federal courts have no power to control or regulate the internal discipline of state prisons. Hatfield v. Bailleaux, 290 F.2d 632, 640 (9th Cir. 1961). In the instant case appellant directs his attack not only at the warden of the state prison and some thirty of his men, but also at the California Department of Corrections and its director. In Roberts v. Barbosa, 227 F. Supp. 20, 21 (S.D. Cal. 1964), the court stated:

> "[P]ersons convicted of crimes and in the custody of their jailers do not look upon the case of Monroe v. Pape (1961) 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, and numerous other cases decided by the Supreme Court concerning civil rights, as a pronouncement of principles for the redress of genuine grievances or wrongs, but rather as a blackjack to be used indiscriminately, maliciously, and at will to harass and annoy not only their jailers, but Judges, Jurors, witnesses and everyone having anything to do with their conviction."

In Civil Rights Act suits against public officials, the district court has an obligation toward the defendants to protect them from malicious and vindictive suits which are without substantial merit and which are designed to harass. Weller v. Dickson, supra, 314 F.2d 598, 601-604 (9th Cir. 1963) (Duniway, J., concurring);

Fletcher v. Young, 222 F.2d 222, 224 (4th Cir. 1955), cert. denied 350 U.S. 916 (1955); Allison v. Wilson, 277 F.Supp. 271, 274 (N.D. Cal. 1967). General and unsupported allegations against such officials have consistently been rejected as insufficient. Agnew v. City of Compton, 239 F.2d 226, 233 (9th Cir. 1956). Appellant's allegations were not sufficient to require the district court to interfere in the internal administration of California prison affairs.

2. No Federal Constitutional Right was Violated by the Alleged Assault and Theft.

The instant case parallels the case of Cullum v. California Department of Corrections, 267 F.Supp. 524 (N.D.Cal. 1967). There, as here, the prisoner claimed to have been assaulted by a prison guard. The court found that an assault by physical force on a single occasion, even if established as fact, did not state a claim upon which relief could be granted:

> "Status of the plaintiff is relevant for at least two reasons: First, a prisoner, unlike a private citizen, is maintained in custody for long periods of time. It is a fact of prison life that this confinement causes great tension, and that there are occasions which require the administration of summary discipline as a means for maintaining order. See Talley v. Stephens, 247 F.Supp. 683, 686 (E.D. Ark. 1965). On the other hand, the private citizen, even as a suspect, is generally not confined to a penal institution, and the same considerations which justify discipline in prison are not applicable to him.

"A second consideration which distinguishes the prisoner's action from one brought by a private citizen is that in the case of the former the Court, by allowing it to proceed to trial, would of necessity involve itself in the administration of discipline in prisons. This involvement is contrary to the declared policy of the Federal Courts which recognizes that the internal matters in state penitentiaries are the sole concern of the state except under exceptional circumstances. United States ex rel. Lee v. People of the State of Illinois, 343 F.2d 120 (7th Cir. 1965). Therefore, an additional consequence in permitting a prisoner to bring this action based on an assault is to inject the Federal Courts into prison administration by virtue of its role as the referee in prison-guard disputes.

"The consequences of such intervention are dangerous. For example, if every time a guard were called upon to maintain order he had to consider his possible tort liabilities, it might unduly limit his actions. Such limitation may jeopardize his safety as well as the safety of other prisoners. For this reason it is imperative that prison officials be given the discretion to apply discipline without the possible debilitating effect that would result if there were judicial review of each and every application of discipline to see who was right and who was wrong. As a general rule, prison authorities are given wide discretion as to the treatment of prisoners. Snow v. Gladden, 338 F.2d 999 (9th Cir. 1964). There is no reason for not extending this discretion to the area of summary discipline in which physical force is used."

The instant case has another factor which makes this an even stronger case for dismissal of the complaint than Cullum. The alleged occurrences here transpired at a time when the state prison was in turmoil and tensions

were running very high. There had been a prison strike and racial incidents and there was a responsibility to maintain administrative control and to assure the safety of those not involved, such as appellant who alleges he refused "to become a part of 'mob' action." The district court properly found that "[t]hese facts certainly justified the type of search involved herein and further, the use of necessary force to maintain order and discipline."

If the assault and theft did in fact occur, they might possibly violate some state law, but they did not infringe upon a federal constitutional right. In Cole v. Smith, 344 F.2d 721, 724 (8th Cir. 1965), a similar case, the court said:

> "[I]t appears that the claim appellant asserts in his complaint is purely private action, not involving constitutionally protected rights; not actionable and enforceable in the federal courts merely because one party happens to be a state employee or official. State officials can only be held accountable under the Civil Rights Act, supra, in the federal courts for conduct and actions taken pursuant to their official duties and where a clear showing is made of a violation of some federal constitutional right. Some of the authorities previously considered hold that an assault by a law enforcement officer, in and of itself, does not raise an action under the Civil Rights Act, and specifically, that alleged assaults by state prison officials, without any showing of a constitutional violation are matters for consideration of internal prison discipline of interest solely to the state and actionable, if at all, in the state courts."

See also United States, ex rel. Atterbury v. Ragen, 237 F.2d 953, 954-955 (7th Cir. 1956); Roberts v. Barbosa, supra, 227 F.Supp. 20, 23 (S.D. Cal. 1964).

3. The Allegations of the Complaint are Frivolous and Malicious

Appellant's complaint for $13,255,000 was frivolous and malicious. It was an attempt to harass the appellees and to interfere with prison administration. As stated in Weller v. Dickson, 314 F.2d 598, 602 (9th Cir. 1963) (Duniway, J., concurring):

> "We know from sad experience . . . that imprisoned felons are seldom, if ever, deterred by the penalties of perjury. They do not hesitate to allege whatever they think is required in order to get themselves even the temporary relief of a proceeding in court. The prospect of amercing their jailers in damages must be a most tempting one, even if it will not get them their freedom. The disruption of prison discipline that the maintenance of such suits, at government expense, can bring about, is not difficult to imagine. Particularly since Monroe v. Pape, 1961, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, it has become apparent that the 'jailhouse lawyers' think that they have a new bonanza in the Civil Rights Act."

The complaint unfolded the story of the alleged beating with obvious caution. Nowhere were any actual injuries alleged. Appellant merely stated that he had surgery a year before and apparently the district court was expected to draw an inference that his ears were somehow damaged from the alleged beating. Appellant

asserted in the complaint that he saw a physician about four days after the claimed beating. Again, he did not allege any injuries or even that the doctor observed such. In fact, he alleged that he returned to his work assignment that very day and reported daily thereafter.

The alleged theft of the oil painting deserves little comment. We know of no federal constitutional provision which prevents prison authorities from removing personal property from the cell of an inmate.

It is the duty of the district court to be alert to the protection of indigents in their lawful rights, but this does not mean that the court must be open to such obviously frivolous and malicious claims as presented here. Spears v. United States, 266 F.Supp. 22, 26 (S.D.W.Va. 1967); Urbano v. Sondern, 41 F.R.D. 355, 358 (Conn. 1966), affirmed, 370 F.2d 13, 14 (1966).

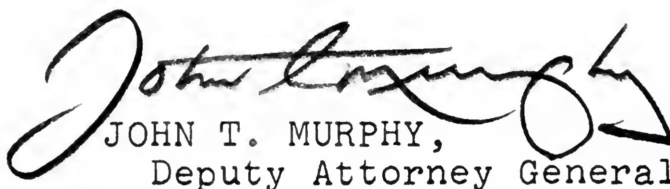
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the district court dismissing the complaint be affirmed.

DATED: March 25, 1968.

THOMAS C. LYNCH, Attorney General
of California,

DERALD E. GRANBERG,
Deputy Attorney General,



JOHN T. MURPHY,
Deputy Attorney General

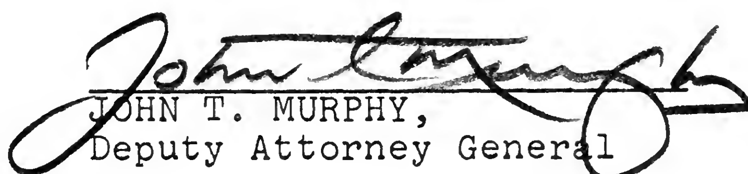
Attorneys for Appellees

rcg
CR SF
67-370

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: March 25, 1968.



JOHN T. MURPHY,
Deputy Attorney General

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FEB 2 1969

CLIFFORD PAUL WILTSIE,

Appellant,

vs.

No. 22380

CALIFORNIA DEPARTMENT OF CORRECTIONS and WALTER DUNBAR, as Director of Corrections, LAWRENCE E. WILSON, as Warden California State Prison, San Quentin California, R. WHAM, as Associate Warden-Custody, California State Prison, San Quentin, California, C. B. McENDREE, as Correctional Captain, California State Prison, San Quentin, California, C. E. MOODY, as Correctional Lieutenant, California State Prison, San Quentin, California, DOES ONE and TWO, as Correctional Sergeants, California State Prison, San Quentin, California, N. T. SMITH and WOODSIDE, and DOES THREE through TWENTY-FIVE, Collectively and Individually,

Appellees.

FILED

APPELLEES' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General

JOHN T. MURPHY
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-1336

Attorneys for Appellees

TOPICAL INDEX

		Page
APPELLEES' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC		1
I	THE PRISONER DID NOT STATE A CAUSE OF ACTION AGAINST APPELLEES, THE KEEPERS OF THE PRISON, BY ALLEGING THAT APPELLEES SMITH, SLEE, STAUTS, WOODSIDE, BROWN AND FEHRENKAMP STRUCK HIM DURING A GENERAL PRISON UPRISING.	2
II	NO CAUSE OF ACTION, IN ANY FORM, WAS ALLEGED BY THE PRISONER AGAINST APPELLEES DUNBAR, WILSON, WHAM, McENDREE, MOODY AND PLANT.	7
III	THE MOTION TO DISMISS UNDER SECTION 1915(d) WAS PROPERLY AND TIMELY MADE, AND THE COMPLAINT WAS PROPERLY AND TIMELY DISMISSED AS FRIVOLOUS AND MALICIOUS.	8
CONCLUSION		9

TABLE OF CASES

	Page
Allison v. Wilson, 277 F. Supp. 271 (N.D. Cal. 1967)	9
Baldwin v. Morgan, 251 F.2d 780 (5th Cir. 1958)	5-6
Brown v. Brown, 368 F.2d 992 (9th Cir. 1966)	5
Cole v. Smith, 344 F.2d 721 (8th Cir. 1965)	4, 8
Cullum v. California Department of Corrections, 267 F. Supp. 524 (N.D. Cal. 1967)	4
Dodd v. Spokane County, Washington, 393 F.2d 330 (9th Cir. 1968)	5
Negrich v. Hohn, 379 F.2d 213 (3rd Cir. 1967)	4
Oughton v. United States, 310 F.2d 803 (10th Cir. 1962)	9
Roberts v. Barbosa, 227 F. Supp. 20 (S.D. Cal. 1964)	7
Screws v. United States, 325 U.S. 91 (1945)	3
Siegel v. Ragen, 88 F. Supp. 996 (N.D. Ill. E.D. 1949), affirmed 180 F.2d 785 (7th Cir. 1950), cert. denied, 339 U.S. 990 (1950)	4
Silver v. Dickson, No. 22,129 United States Court of Appeals for the Ninth Circuit (November 8, 1968)	6
United States v. Jackson, 235 F.2d 925 (8th Cir. 1956)	5-6
United States v. Price, 383 U.S. 787 (1966)	5

TABLE OF CASES
(Continued)

	Page
United States v. Walker, 216 F.2d 683 (5th Cir. 1954)	5-6
United States ex rel Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956)	4
Weller v. Dickson, 314 F.2d 598 (9th Cir. 1963) (Duniway, J., concurring)	7
Wright v. Rhay, 310 F.2d 687 (9th Cir. 1962)	9

STATUTES, TEXTS AND AUTHORITIES

18 U.S.C. §§ 241-245	5
§ 242	6
28 U.S.C. § 1915(d)	8-9
42 U.S.C. §§ 1983 and 1985 (1964)	2
Civil Rights Act, (Rev. Stat. §§ 1979 and 1980 [1875])	2
Federal Rules of Appellate Procedure, Rules 35 and 40	1
United States Court of Appeals for the Ninth Circuit, Rule 12	1-2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFFORD PAUL WILTSIE, Appellant, vs. CALIFORNIA DEPARTMENT OF CORRECTIONS and WALTER DUNBAR, as Director of Corrections, LAWRENCE E. WILSON, as Warden California State Prison, San Quentin, California, R. WHAM, as Associate Warden-Custody, California State Prison, San Quentin, California, C. B. McENDREE, as Correctional Captain, California State Prison, San Quentin, California, C. E. MOODY, as Correctional Lieutenant, California State Prison, San Quentin, California, DOES ONE and TWO, as Correctional Sergeants, California State Prison, San Quentin, California, N. T. SMITH and WOODSIDE, and DOES THREE through TWENTY-FIVE, Collectively and Individually, Appellees.	)	No. 22380

APPELLEES' PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

TO THE HONORABLE RICHARD H. CHAMBERS, WALTER L. POPE and FREDERICK G. HAMLEY, CIRCUIT JUDGES:

Come now appellees Walter Dunbar, Lawrence E. Wilson, R. Wham, C. B. McEndree, C. E. Moody, N. T. Smith, K. J. Slee, M. R. Stauts, Woodside, R. L. Brown, T. Plant and R. O. Fehrenkamp, and pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Rule 12 of the Rules of the

United States Court of Appeals for the Ninth Circuit, respectfully request rehearing en banc of this Court's exceptionally important decision of December 31, 1968, in the above-entitled proceeding, which was a review of an order of the United States District Court for the Northern District of California dismissing a state prisoner's complaint filed in forma pauperis under the Civil Rights Act (Rev. Stat. §§ 1979 and 1980 [1875]; 42 U.S.C. §§ 1983 and 1985 [1964]).

As grounds for rehearing en banc, appellees respectfully represent:

I

THE PRISONER DID NOT STATE A CAUSE OF ACTION AGAINST APPELLEES, THE KEEPERS OF THE PRISON, BY ALLEGING THAT APPELLEES SMITH, SLEE, STAUTS, WOODSIDE, BROWN AND FEHRENKAMP STRUCK HIM DURING A GENERAL PRISON UPRISING.

Appellees, in January of 1967, were duly employed by the Department of Corrections of the State of California to operate and maintain the state penitentiary at San Quentin. By reason of this employment and its corresponding responsibility, appellees at all times exercised authority, control and discipline over the volatile prison population. Wiltsie, having lost his right to the free society of men, was appellees' prisoner and was subject to their authority, control and discipline.

As Wiltsie's complaint makes manifestly clear, the single alleged event of which he complains took place not during days of prison tedium and routine but during days of uprising and riot. Assuming the truth of his allegation,

during this period of turmoil Wiltsie was struck by certain named appellees while they were searching him for weapons or contraband. As described by the district court:

> "[T]his occurrence transpired at a time when prison tension was running high. It was shortly after a prison strike and certain racial incidents, which makes it clear that there was legitimate concern with the problems of maintaining control of the situation. These facts certainly justified the type of search involved herein, and further, the use of necessary force to maintain order and discipline."

Wiltsie did not allege in the district court any pattern of violence directed against him or even any injury to his person resulting from the alleged attack. He merely asserted that he was the victim of physical force. We submit that an allegation that force was used upon the prisoner during a general search of inmates necessitated by a prison riot, states no cause of action in a federal court under the Civil Rights Act. We further submit that the Court's decision establishing the sufficiency of Wiltsie's allegation is not in juxtaposition with other cases, or the intent of the Civil Rights Act.

In Screws v. United States, 325 U.S. 91, 108-109 (1945), the Supreme Court pointed out:

> "The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or

secured by the Constitution or laws of the United States."

In Cole v. Smith, 344 F.2d 721 (8th Cir. 1965), the state prisoner alleged that he had been assaulted by hospital aids in the prison hospital resulting in "scars, partial loss of hearing, and a disfigured ear." This was certainly a serious assault allegation. Nevertheless, the court affirmed the district court's dismissal of the civil rights action and applied the following rule, at page 724:

> "[A]n assault by a law enforcement officer, in and of itself does not raise an action under the Civil Rights Act, and, specifically, that alleged assaults by state prison officials, without any showing of a constitutional violation, are matters for consideration of internal prison discipline of interest solely to the state and actionable, if at all, in the state courts."

Charges of aggression against state prison officials and guards, asserted as acts committed under color of state law, do not in and of themselves state claims upon which relief can be granted; and this rule has been applied by other courts. Negrich v. Hohn, 379 F.2d 213, 215 (3rd Cir. 1967); United States ex rel Atterbury v. Ragen, 237 F.2d 953, 954-955 (7th Cir. 1956); Cullum v. California Department of Corrections, 267 F. Supp. 524 (N.D. Cal. 1967); Siegel v. Ragen, 88 F. Supp. 996 (N.D. Ill. E.D. 1949), affirmed 180 F.2d 785 (7th Cir. 1950), cert. denied, 339 U.S. 990 (1950). In

the latter case the prisoner alleged "that he had been struck and beat over the head with a black-jack by an officer, resulting in infection of the middle ear and complete deafness in that ear. . . ." The court, in dismissing the claim, said it was "not prepared to establish itself as a 'co-administrator' of State prisons along with the duly appointed State officials."

Nothing in United States v. Price, 383 U.S. 787 (1966), Dodd v. Spokane County, Washington, 393 F.2d 330 (9th Cir. 1968), Brown v. Brown, 368 F.2d 992 (9th Cir. 1966), United States v. Jackson, 235 F.2d 925, 928-929 (8th Cir. 1956), United States v. Walker, 216 F.2d 683 (5th Cir. 1954) and Baldwin v. Morgan, 251 F.2d 780 (5th Cir. 1958), requires the result reached in the instant case. Price involved the alleged murder of three civil rights workers by Mississippi law enforcement officials; the sole issue was whether the conduct for which the defendants were indicted came within the scope of 18 U.S.C. §§ 241-245. In Dodd the dismissal of the civil rights complaint was reversed because this Court found defects in the procedure used by the district court and found that the complaint had been dismissed because the district court erroneously concluded that the Civil Rights Act was unavailable to a prisoner able to seek compensation in the state courts for the same alleged wrong. Dodd and Brown concerned beatings allegedly administered to force the prisoners to confess or testify falsely; these were attempts to interfere with the prisoners' constitutional rights by the continuous use and threat of force, not isolated incidents of force.

Jackson merely ruled on the sufficiency of an indictment under 18 U.S.C. § 242. The court found that the indictment which followed the form of the federal rules and the substance of the statute stated an offense against the United States. Walker is to the same effect. Baldwin was a class action by Negroes, not in custody, alleging a cause of action of discriminatory segregation in the Birmingham, Alabama, railroad terminal.

The above cases, relied on by this Court, are not relevant to any issue here and, thus, not controlling.

The instant case will have monumental impact not only upon the personal and professional lives of the appellees but upon the Department of Corrections and all of its employees. Any application of force, regardless of degree or purpose, by prison personnel will apparently subject the individuals involved and their supervisors to the threat of a lawsuit with the consequent possibility of monetary damages against them. The recent words of this Court in dismissing a suit against the members of the California Adult Authority are equally applicable to the employees of the Department of Corrections:

> "The monetary threat would, in all likelihood, exert a restricting influence on the overall functioning of the agency. And there would undoubtedly ensue an 'appalling inflammation of delicate state-federal relationships'. . . ." Silver v. Dickson, No. 22,129, United States Court of Appeals for the Ninth Circuit

(November 8, 1968).

Moreover, employees of the Department of Corrections cannot effectively perform their important work unless they are free from fear, reprisal and intimidation generated by inmates. Weller v. Dickson, 314 F.2d 598, 602 (9th Cir. 1963)(Duniway, J., concurring); Roberts v. Barbosa, 227 F. Supp. 20, 21 (S.D. Cal. 1964). The sustaining of the dismissal against the entity "California Department of Corrections," while proper, provides protection to the State which is more illusory than real. The instant case provides no safeguard against harrassing, fancied, imagined or misguided actions.

II

NO CAUSE OF ACTION, IN ANY FORM, WAS ALLEGED BY THE PRISONER AGAINST APPELLEES DUNBAR, WILSON, WHAM, McENDREE, MOODY AND PLANT.

Wiltsie's only allegation concerning appellee McEndree is that his voice announced over the prison public address system that there would be a general search of all cells for weapons and contraband. The sole allegation about appellee Moody is that he was named by McEndree and acted as the supervisor of the search. Appellee Plant is mentioned in Wiltsie's complaint only because he allegedly ordered appellees Smith, Slee, Stauts, Woodside and Brown to cease whatever they were purportedly doing to Wiltsie. Dunbar, Wilson and Wham are apparently being sued because they happened to be the administrators of the Department of Corrections at the time of the riot and the purported event. During a prison riot, or at any other time for that matter, it is hardly a violation of

prisoners' constitutional rights to take affirmative action to restore order, to direct and carry out a general search for weapons and contraband, or to order other personnel to cease doing something the prisoner himself alleges they should not be doing. Under the circumstances alleged by Wiltsie, these appellees at least should not be immersed in this $13,255,000.00 lawsuit.

III

THE MOTION TO DISMISS UNDER SECTION 1915 (d) WAS PROPERLY AND TIMELY MADE, AND THE COMPLAINT WAS PROPERLY AND TIMELY DISMISSED AS FRIVOLOUS AND MALICIOUS.

In footnote 1, this Court states that the "provision of section 1915(d) [28 U.S.C. § 1915(d)] for dismissal of a frivolous or malicious action actually contemplates _sua sponte_ action by the district court before summons has issued, rather than action pursuant to a motion to dismiss" (Slip opinion, p. 4). This statement injects considerable confusion into the procedure for disposition of a civil rights action.

The preferable procedure has been to permit the filing of the complaint _in forma pauperis_ in the first instance, and then, after summons has issued, to permit dismissal of a frivolous or malicious complaint upon motion of the defendants or _sua sponte_ by the court. "The reason for this is, a complete record can thus be made in each case in an orderly fashion, both for the benefit of the District Court and this Court in the protection of any legal rights the petitioner may have." _Cole_ v. _Smith_, _supra_, 344 F.2d 721, 723 (8th Cir.

1965); Oughton v. United States, 310 F.2d 803, 804 (10th Cir. 1962). This Court, moreover, has suggested that a district court exercise "great restraint" when dismissing a complaint sua sponte. Wright v. Rhay, 310 F.2d 687, 688 (9th Cir. 1962). See also Allison v. Wilson, 277 F. Supp. 271, 273 (N.D. Calif. 1967).

We submit that defendants, after issuance of summons, may bring to the court's attention the record which proves the frivolity or maliciousness of a complaint, by a motion to dismiss pursuant to section 1915(d).

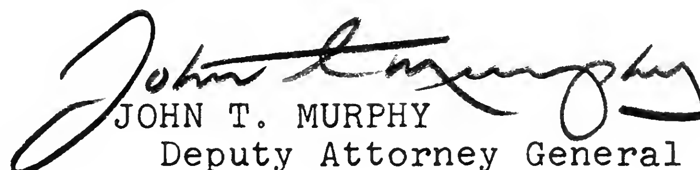
CONCLUSION

For the foregoing reasons, we respectfully request a rehearing and suggest such rehearing en banc.

DATED: January 7, 1969

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General



JOHN T. MURPHY
Deputy Attorney General

Attorneys for Appellees

JTM:em
CR-SF
002299

NO. 22381

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM LORIN BORCHERT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

APR 2 1968

WM. B. LUCK, CLERK

BRIEF FOR APPELLANT

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SANDER L. JOHNSON
HAROLD B. BERNSON
1800 Avenue of the Stars
Suite 415
Los Angeles, California 90067

Attorneys for Appellant

NO. 22381

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM LORIN BORCHERT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SANDER L. JOHNSON
HAROLD B. BERNSON
1800 Avenue of the Stars
Suite 415
Los Angeles, California 90067

Attorneys for Appellant

TOPICAL INDEX

		Page
Table of Authorities		ii
STATUTORY BASIS OF APPEAL		1
STATEMENT OF THE CASE		2
I	Proceedings to Date	2
II	The Facts of This Case	2
SPECIFICATION OF ERRORS RELIED ON		10
QUESTIONS PRESENTED		10
SUMMARY OF ARGUMENT		10
I	TAKING INTO ACCOUNT ALL PROCEEDINGS AGAINST HIM FROM TIME OF ARREST TO TIME OF CONVICTION, WITH PARTICULAR REFERENCE TO LINEUP PROCEDURES, APPELLANT DID NOT RECEIVE A FAIR TRIAL.	11
II	THE PRESENTATION OF EVIDENCE AND TESTIMONY ON BEHALF OF APPELLANT AT TRIAL WAS INADEQUATE SO AS TO CONSTITUTE DENIAL OF A FAIR TRIAL AND THE LACK OF EFFECTIVE COUNSEL.	23
CONCLUSION		26
CERTIFICATE		27

TABLE OF AUTHORITIES

Cases	Page
Gilbert v. State of California, 388 U.S. 262, 87 S.Ct. 1951 (1967)	11, 20, 22, 23
People v. Caruso, ___ A.C. ______, 65 Cal. Rptr. 336, 436 P.2d 336 (1968)	21
People v. Welborn, ___ A.C.A. ___, 65 Cal. Rptr. 8 (1968)	24
Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967)	11, 12, 20, 23
United States v. Meyers, 381 F.2d 814 (1967)	20
United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926 (1967)	11-20, 22, 23
Wise v. United States, 383 F.2d 206 (1967)	21

Constitution

United States Constitution:

Fifth Amendment	20
Sixth Amendment	19

Statutes

Title 18, United States Code, §2113a	1, 2, 7
Title 18, United States Code, §2113f	7
Title 18, United States Code, §3231	1
Title 28, United States Code, §1291	1
Title 28, United States Code, §1294	1

Texts

24 A.L.R. 1025	24
64 A.L.R. 436	24

NO. 22381

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM LORIN BORCHERT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

STATUTORY BASIS OF APPEAL

Date of conviction: June 22, 1967

Date of sentence: September 11, 1967

Appellant, on December 12, 1967 filed a timely Notice of Appeal (Clk. Tr. 62).

The District Court had jurisdiction under the provisions of Title 18, United States Code, Section 2113a and Section 3231.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

STATEMENT OF THE CASE

I

Proceedings to Date

Appellant was charged with one count of violation of Title 18, United States Code, Section 2113a (Clk. Tr. 3), to which he pleaded not guilty (Clk. Tr. 4) and proceeded to trial by jury on June 20, 1967 (Clk. Tr. 10). After a verdict of guilty by the jury (Clk. Tr. 25) judgment of conviction was entered (Clk. Tr. 61). Appellant thereafter made a motion for new trial supported by his affidavit and supplementary affidavit (Clk. Tr. 30, 39). Said motion was denied on September 11, 1967, and judgment of conviction and sentence then entered (Clk. Tr. 61).

II

The Facts of This Case

The testimony of the significant witnesses relating to the issues raised by appellant will be summarized, and references in brackets will be to the Reporter's Transcript unless otherwise noted as Clerk's Transcript.

Appellant, a resident of Huntington Beach, California, at all times herein mentioned was and now is employed by Don W. Snyder Company, a liquor distributing company in Los Angeles, as a hotel and club manager (139, 159).

On March 15, 1967, at about 2:40 p.m., La Canada Branch of the Bank of America, 651 Foothill Boulevard, La

Canada, California (hereinafter called "the Bank") was robbed of $954.00 (80-84).

At approximately 6:52 p.m. appellant was arrested as he arrived at his home in Huntington Beach as suspect of the crime (130-132).

At some time after the arrest appellant was advised orally of his constitutional rights (132) and at that time, he signed a written waiver of such rights with the time of signing noted at 7:38 p.m. (132-135). Appellant arrived at his home, at the time of arrest, in a 1965 white Comet, California License No. NGE 890 (131, 136).

On questioning by the arresting officers at the Huntington Beach Police Department, appellant denied involvement in the robbery and accounted for his activities on the day in question, during all of which only he had driven the 1965 Comet (135-137). Included in his activities, as stated by him to the officers on being questioned, was a stop at the Bank for the purpose of making telephone change from a five dollar bill so as to make telephone calls along his sales route (137). He also told the arresting officers he performed paperwork while parked outside the bank, before going in to get the change (137).

At the time of the arrest one of the arresting officers searched the trunk of appellant's vehicle and found $46.00 in one dollar bills in the left tire well and $209.00 in currency in a golf bag located therein (155). Appellant volunteered to the questioning officers on his arrest that he had approximately $150.00 in a golf

bag cover in the trunk of his car, but did not know where any other money would have come from (138-139).

At trial the arresting officers testified to the foregoing circumstances surrounding the arrest and the statements attributed to the appellant.

Bank personnel testified by way of identification of the defendant. The bank was located at the northwest corner of Oakwood Street and Foothill Boulevard in La Canada(7).

Two of the bank personnel, witness Jones and witness Hastie, identified the appellant as observed seated in a white car License No. NGE 890 parked outside the bank, for some fifty minutes prior to the robbery; stated that he was taking his glasses off and on and appeared to be working on some papers; and further that he drove away from the point where he was parked and returned to the same spot on more than one occasion (6-18).

Witness Jones identified the appellant as a man who later came in the front door of the bank and went to the window of witness Hastie, then departed to return fifteen to twenty minutes later, at which time he held up witness Canada, a teller (21-23).

Witness Hastie testified that after she had observed appellant parked in his car outside the bank, he came to her teller window inside the bank and asked for and received change for a twenty dollar bill, whereupon he departed through the front door (52-54); that approximately ten minutes later she saw appellant come back into the bank, go to the window of teller Maria Canada, then depart by way of the rear door (55-57).

Witness Canada identified the appellant as the person who held her up at about 2:40 p. m., after placing a brief case on the counter in front of her teller window, and that he then departed by way of the back door of the bank (80-87). This identification was confirmed by the testimony of witness Corey (97-99).

Other bank personnel identified the appellant as leaving the bank at about the time of the robbery by way of the back door, getting into a white Comet and then driving away (111-117, 122-124).

Cross-examination of the prosecution witness for the most part was brief and of the nature of a recapitulation of the testimony given on direct examination. No testimony was elicited from either prosecution or defense witnesses concerning the placing of appellant in a lineup for purposes of identification, after his arrest.

On his own behalf, appellant testified that on March 15, 1967 he drove his 1967 Comet, License NGE 890, from his office for the purpose of calling upon accounts in the Glendale area and that he then proceeded to the following places for the same purpose: Oakmont Country Club, Montrose Vons Grocery, La Canada Country Club, Sparr Restaurant on Foothill Boulevard near the bank, where he had lunch; then at 1:30 to 2:00 p. m. to Vons Grocery across the street from such restaurant; thereafter he parked outside the bank facing north on Oakwood Street above Foothill; there he sat in his car, posted sales in his route book and outlined his route for the balance of the day; he had been

in the bank several times before as a place of convenience on his sales route for the purpose of making interbank deposits and getting change; prior to March 15, he had seen some of the bank personnel who had testified against him and had spoken to the witness Kieffer, a bank employee; he went into the bank by the front entrance and got telephone change for a five dollar bill; he drove north on Oakwood and returned to Foothill Boulevard where he phoned his office from a service station; he got into his car and proceeded west on Foothill to a point in front of the bank where he made a U-turn so as to go east on Foothill; he then completed his business calls for the balance of the day, going to West Covina, Glendora, Fontana and Upland; he then telephoned his wife in Huntington Beach who advised the police who were looking for him; he arrived home at about 7:00 p.m.; after his arrest and questioning he told police he had between $150.00 and $200.00 in his golf bag in the car, which he was saving for his 25th wedding anniversary; he did not return to the bank after cashing his five dollars; he did not wear a hat or carry an attache case, as testified by prosecution witnesses at the time he was allegedly committing the robbery (all of the foregoing, 159-178); the sales book he was working on while seated in his car outside the bank had been taken by the Federal Bureau of Investigation and later returned to him and the results of his work for the afternoon of March 15, 1967 are recorded in that book (174); the last time, prior to March 15, he had been in the bank was from one week to ten days to two weeks (182, 223).

Appellant's wife was called briefly on his behalf to confirm that prior to appellant's return to their home on March 15, he telephoned her and she advised him that the police had been there looking for him (195-197). The only other witnesses called by appellant were character witnesses.

In rebuttal appellee produced evidence of a palm print on the counter at witness Canada's teller window, which palm print the expert believed to be that of appellant (212-214).

The parties stipulated that the Bank is a bank within the statutory definition of a member bank of the Federal Reserve System as required and defined by Sections 2113a and 2113f of Title 18, United States Code (253).

In addition to the foregoing, as shown by the affidavit and supplemental affidavit of appellant (Clk. Tr. 30, 39), the following facts appear.

After questioning by the arresting officers on March 15, 1967 at the Huntington Beach Police Department appellant was transported to the Lakewood office of the Los Angeles County Sheriff's Department and thereafter to the Los Angeles County Jail, where he removed his civilian clothing and put on jail clothing provided him. Appellant was then placed in a lineup with three other men, each of whom wore a white band on his wrist of the type worn by jail inmates. Appellant did not wear such a band. The three other men who were in the lineup were of a different height, stature and complexion and appellant estimated a ten year difference in their ages and his. At the request of officers, he

repeated certain statements, in substance: "Be quiet. Go to the vault and get me the money." Appellant was also asked to place glasses on his face, as were the other persons in the lineup. When initially arrested, appellant was informed of constitutional rights respecting the right to counsel and that he may remain silent; but at the time of being placed in the lineup, which had to be some hours later, no one informed him he had a right to have counsel present at such a procedure. Had appellant known he had the right to have an attorney present at the lineup, he would have requested counsel (Clk. Tr. 30-32).

On March 17, 1967, two days after his arrest, appellant dictated and had transcribed all the facts as he knew them surrounding his activities and conduct on the day of the alleged offense. This document detailed persons with whom he was in contact on said day and charted his activities of that day in order to establish that the arrest and identification of appellant as the robber of the bank was a matter of mistaken identification. Said document was given to counsel who represented appellant at trial, and appellant suggested the persons referred to therein be called as witnesses on his behalf for the purpose of establishing his pattern of activities on the day of the robbery, and his condition, attitude and emotional state both before and after the robbery. One of said witnesses would have testified to the effect that appellant had a severe limp and was wearing a soft shoe on his left foot because of a sore condition of the foot (Clk. Tr. 39-48).

After his original consultation with trial counsel, appellant,

other than a final conference the friday before trial, consulted said counsel on two occasions, each lasting fifteen to thirty minutes and spoke again of calling the mentioned witnesses on his behalf. In addition, appellant spoke of testimony to establish his background and position, the fact that he had earned in excess of $15,000.00 per year for three years working for his employer, and that he would earn considerably in excess of such figure in 1967 (Clk. Tr. 39-48).

At least eight persons, as indicated in said memorandum given to counsel, could have been called to establish the general pattern of appellant's activities on Wednesdays of every week and the facts and circumstances as they knew them on the particular Wednesday of March 15, 1967. Said testimony and evidence would have gone to the issue of motivation, whether appellant was likely to have committed the offense charged, and mistaken identification, and to show that in connection with his business activities, he was often near and in the bank which was robbed. Appellant's route notebook with entries and notations showing the reason for his being in the area of the bank and the various places of business visited by him on March 15, 1967 was available but was not put into evidence. Appellant was surprised when the witnesses and evidence herein referred to were not produced at trial and that no issue was made at trial of the previous identification of himself at the lineup as the person who had committed the robbery (Clk. Tr. 39-48).

SPECIFICATION OF ERRORS RELIED ON

The District Court erred in denying appellant's motion for a new trial, upon the ground that he had been deprived of a fair trial and denied effective aid of counsel within the meaning of constitutional rights afforded him.

QUESTIONS PRESENTED

I

In the totality of the circumstances surrounding appellant's trial and conviction, was he deprived of a fair trial within the meaning of due process of law?

II

Was the presentation of evidence and testimony on behalf of appellant at trial sufficiently adequate so as to constitute a fair trial within the meaning of due process of law?

SUMMARY OF ARGUMENT

In the totality of the circumstances surrounding his arrest and conviction, with particular reference to subjecting him to lineup procedures, appellant did not receive a fair trial within the concept of due process of law as enunciated by the Supreme Court in recent cases. Further, in the presentation at trial of appellant's defense, there was a failure to present the cause of

appellant in fundamental respects, thus denying appellant a fair trial and effective aid of counsel.

I

TAKING INTO ACCOUNT ALL PROCEEDINGS AGAINST HIM FROM TIME OF ARREST TO TIME OF CONVICTION, WITH PARTICULAR REFERENCE TO LINEUP PROCEDURES, APPELLANT DID NOT RECEIVE A FAIR TRIAL.

In the time since appellant's trial and conviction, pertinent decisions of the Supreme Court upon the issues raised have been published: United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926 (1967); Gilbert v. State of California, 388 U.S. 262, 87 S. Ct. 1951 (1967); Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967 (1967).

The facts upon which these cases are based are well known by now, having to do with the right to counsel at all stages of the proceedings against a defendant; the question whether in-court identification was in truth based upon observations made by the witness at the time the crime was committed and whether in the context of all the proceedings against a defendant, including lineup, he has received a fair trial within the concept of due process.

It is the contention of appellant that in the entire context of the proceedings against him, with particular reference to the lineup to which he was subjected, he did not receive a fair trial, and that this conclusion follows from careful examination of the

cases cited, and from more recent authorities.

In each of the three cases above mentioned, in addition to the in-court identifications made of the defendant, the witnesses admitted to lineup identification, in contrast to the situation at hand where the lineup identification was not brought out. Nevertheless, as will hereinafter appear, the reasoning of the Supreme Court makes the principles of these three cases applicable here.

In summary the applicable principles are:

1. The lineup procedure is indeed a critical point in the criminal proceedings, one where the die of defendant's guilt may be so cast as to make the trial a formality.

As the court said in Wade (p. 224):

"In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings."

And, further at p. 298 of Stovall:

"We have, therefore, concluded that the confrontation is a 'critical stage', and that counsel is required at all confrontations."

2. The very procedure is one fraught with the possibility of abuse unless governing rules of fairness are observed.

On this point the court in Wade said further (p. 228):

> "But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially derogate from a fair trial. The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted?' "

3. By the very hypothesis a defendant is entitled to have an attorney present at such proceedings unless he has intelligently waived such right (Wade, p. 237).

4. The testimony of identifying witnesses at trial may not be tainted with violation of such constitutional right of the accused (Wade, pp. 238-240).

5. The right to cross-examination of such witnesses as to whether their identification at trial was formed independent of the lineup procedure is part and parcel of the concept of fair trial (Wade, pp. 239-241).

To quote further from Wade, p. 227:

> "In sum, the principle of Powell v. Alabama

> and succeeding cases requires that we scrutinize _any_ pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."

In the case at bar the prosecution, as it need not have, did not examine the identifying witnesses upon the matter of previous lineup identifications, nor did counsel for appellant make such inquiry upon cross-examination.

In support of his motion for new trial appellant submitted his affidavit and supplemental affidavit wherein are set forth some of the facts and circumstances surrounding a lineup where he was presumably exposed for identification to persons who claimed to have observed the robbery (Clk. Tr. 30, 39). Without question the lineup procedures employed could not meet the criteria mentioned in _United States v. Wade._ There the court mentioned such disqualifying factors as: placing only a few persons in the lineup with the accused; the marked dissimilarity in appearance between the suspect and the others; and the impermissibility of using

words allegedly used during a criminal act (pp. 233, 236-237).

Here only three other persons appeared with defendant. The physical differences between appellant and these three were such as to make the exposure individious to the point of being obvious. Appellant wore no jail identification bracelet; the others did. His physical characteristics and age were grossly dissimilar to theirs. He wore on one foot a regular walking shoe and on the other a soft, white shoe (because of a lame foot).

Thus, the situation at lineup was to, begin with, fraught with the very dangers to an accused which the Supreme Court dwelt upon at length in Wade. In the circumstances, it is submitted, the court must closely scrutinize both the question of whether appellant had intelligently waived his right to counsel (standing alone as he was against the state at a stage of the prosecution - formal or informal, in court or out - where counsel's absence might derogate from his right to a fair trial, United States v. Wade, supra, p. 226), and whether absent exposure at trial of the facts surrounding lineup identification it can be said he received a fair trial within the concept of constitutional guarantees.

As in the Wade case, on the record before the court the questions are difficult to resolve. But, as there, the court can grant relief, following the suggestions of the Supreme Court (p. 242):

> "On the record now before us we cannot make the determination whether the in-court identifications had an independent origin. This

was not an issue at trial, although there is some evidence relevant to a determination. That inquiry is most properly made in the District Court. We therefore think the appropriate procedure to be followed is to vacate the conviction pending a hearing to determine whether the in-court identifications had an independent source, of whether, in any event, the introduction of the evidence was harmless error."

Testimony was adduced at trial to the effect that appellant was initially advised of his constitutional rights, including the right to counsel. He even signed a statement acknowledging such advice. But the question here must be whether such advice, given at one critical and early stage of the criminal proceedings, suffices in relation to a stage later in time, one which does not obviously come within the ambient of meaning of the original advice, and in turn this factor must be considered in relation to the question whether in the total circumstances appellant received a fair trial.

The Supreme Court's comments in Wade on the particularly significant and emotional procedure of lineup puts the answer in doubt (pp. 230-231):

"Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one

being confronted with potential accusers."

Appellant not having had the benefit of counsel at the lineup, counsel at trial was surely in the classic dilemma mentioned by the court in Wade at pp. 240-241, on account of which it may be well said of appellant that he has suffered the consequences of that dilemma. There the court said:

> "The State may then rest upon the witnesses' unequivocal courtroom identification, and not mention the pretrial identification as part of the State's case at trial. Counsel is then in the predicament in which Wade's counsel found himself--realizing that possible unfairness at the line-up may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover the reveal unfairness, while bolstering the government witness courtroom identification by bringing out and dwelling upon his prior identification. Since counsel's presence at the line-up would equip him to attack not only the line-up identification but the courtroom identification as well, limiting the impact of violation of the right to counsel to exclusion of evidence only of identification at the line-up itself disregards a critical element of that right."

The court there further pointed out at page 242 that from the record it was impossible to determine whether the in-court identifications had an independent origin. The court believed that inquiry should be made in the District Court.

The court stated specifically at page 242:

> "We therefore think the appropriate procedure to be followed is to vacate the conviction pending a hearing to determine whether the in-court identifications had an independent source, or whether, in any event, the introduction of the evidence was harmless error."

It was said too that no hard and set rule can be made regarding exclusion of courtroom identification by reason of the absence of counsel at lineup. Rather, it was pointed out that the Government should be given the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than at the lineup (p. 240). The rules as laid down in Wade were not yet available at the time of appellant's trial so as to have guided the trial court respecting the admissibility of courtroom identifications.

In any event, appellant's own statement in his affidavits that he did not realize his rights include the presence of counsel at the lineup stage clearly shows any claimed waiver of such rights could not have been intelligently made, as required.

As already pointed out, in the case at hand this lack may

only relate to the most basic issue of all -- whether the whole fabric of the proceedings can be fashioned into the cloak of fair trial guaranteed to the defendant. Wade requires that the court scrutinize any pretrial confrontation of the accused to determine whether presence of counsel was necessary to preserve his right to fair trial as affected by his right meaningfully to cross-examination of witnesses against him. Security of the right to fair trial was said to be as much the aim of right to counsel as it is of the other guarantees of the Sixth Amendment.

The court here has before it not merely the pat, almost glib, unchallenged identification of defendant as made by the prosecution witnesses at trial. Rather, it may now consider all the facts surrounding the arrest and detention, including the critical stage of the lineup identification, as shown by the affidavits submitted by appellant. The resultant duty of the court, it is submitted, is to apply the test of fair trial within this context. This it should do bearing in mind the fact that appellant's only defense to the charge, one which he anticipated presenting through the testimony of numerous witnesses and himself, was that he had been mistakenly identified as the robber. Part and parcel of a fair trial for appellant would be meaningful cross-examination of identifying witnesses as mentioned by the court in Wade (p. 227, above quoted), which could never be achieved if in fact his constitutional rights were violated as now claimed.

Thus, this Court is in a position to rectify the appellant's situation, to make certain by directing a new trial that all

appellant's rights have been preserved -- his right to counsel at a critical stage of the proceedings, to be deemed abandoned only upon intelligent waiver, and his right, in the light of all circumstances, to a fair trial where all defenses and issues are heard.

While it is true that Stovall applied Wade and Gilbert only prospectively, i. e. as to those lineups held subsequent to June 12, 1967, the case of United States v. Meyers, 381 F. 2d 814 (1967) is helpful. Thereafter noting such limited application of the doctrine, the court said at pages 816-817 of the doctrine:

> "Relator is not precluded, however, from inquiring into the 'totality of the circumstances' surrounding the line-ups in order to determine whether the procedures were so unfair as to deprive him of a fair trial. Stovall v. Denno, supra at 302, 87 Supreme Ct. 1951, and see Palmer v. Peyton, 359 Fed. 2d 199 (4 Cir. 1966), cited with approval in Stovall at 302 of 387 U. S., 87, S. Ct. 1967."

This concept of fairness, i. e. apart from the sole question of the right to counsel at lineup, was applied by the Court of Appeals for the District of Columbia Circuit in a case where identification was made only minutes after apprehension. While refusing to find the circumstances of the confrontation so unfair as to require exclusion of testimony thereof under Stovall and the due process clause of the Fifth Amendment, because of the

circumstances of fresh identification, the court said:

> "It may be that in a particular case there would be reason, without denying the general principle of prompt identifications, to say that the particular identification was conducted in such an unfair way that it cannot tolerably be admitted into evidence."
>
> Wise v. United States, 383 F. 2d 206, 210 (1967).

Again, in a recent decision of the Supreme Court of California, this rule was applied where the identification had taken place prior to June 12, 1967: People v. Caruso, ___ A. C. ___, 65 Cal. Rptr. 336, 436 P. 2d 336 (1968). The facts of the case before the court were similar to those at hand. A store was robbed at about 12:45 p. m. At about mid-morning one of the employees, who was later one of the two persons actually robbed, had observed the defendant in a car parked on the store parking lot. Other witnesses had observed the defendant in the area at later time of day. Defendant was arrested on the night of the robbery and the next morning was placed in a lineup with four other men, and the testimony of both witnesses for the defense and prosecution established that the other lineup participants did not physically resemble the defendant in important respects.

The two victims identified defendant as the driver of the robbery car. One of them further identified defendant as the man in the store parking lot who had briefly attracted his notice earlier

that morning. Other witnesses placed defendant in the vicinity of the store at a time later in the day. The two victim witnesses were questioned as to circumstances surrounding the identification of the defendant at the lineup the morning after the arrest.

The California court took note that under Stovall the rule of Wade and Gilbert is to be given only prospective application. However, the court went on to hold that the lineup resulted in such unfairness that it infringed upon defendant's right to due process of law, since the lineup was unnecessarily suggestive and conductive to irreparable mistaken identification. The court specifically held that the lineup's grossly unfair make up deprived defendant of due process of law (pp. 339, 340). The court took note of other circumstances lending credence to the defense, such as the fact that a police search of the defendant's home failed to reveal either the automatic pistol or the missing receipts, that no motive for the offense was ever established, that defendant was steadily employed at satisfactory wage and maintained a good reputation at work, and was married with children.

Thus in the totality of the circumstances surrounding the trial and conviction of appellant, it may be said at the very least that it does not clearly appear that appellant received a fair trial under the concept of due process of law.

II

THE PRESENTATION OF EVIDENCE AND TESTIMONY ON BEHALF OF APPELLANT AT TRIAL WAS INADEQUATE SO AS TO CONSTITUTE DENIAL OF A FAIR TRIAL AND THE LACK OF EFFECTIVE COUNSEL.

Appellant recognizes the extreme difficulty of raising the issue of failure to present an adequate defense and lack of effective counsel at trial. Nevertheless, again considering the totality of the circumstances, it must surely appear from his supplemental affidavit submitted in support of his motion for new trial (Clk. Tr. 39) and from the testimony as shown in the Reporter's Transcript that in certain fundamental respects there was a failure to present his cause.

It may be true that the failure to question identifying witnesses concerning their prior identification at lineup resulted from a dilemma and confusion faced by counsel that in effect was resolved only after trial, by Wade, Gilbert and Stovall. Yet appellant had anticipated, counted upon, a presentation of testimony and evidence concerning the pattern of conduct of his activities on every Wednesday of the week and on the particular Wednesday of the robbery with which he was charged. He was lame that day, but no mention was made of this by identifying witnesses, nor was the fact brought out on cross-examination. This fact could have been collaborated by several witnesses on behalf of appellant. In the course of his business, as he was going through his normal Wednesday routine, appellant met and talked with numerous persons,

both before and after the robbery, who could have testified concerning his attitude, emotions and state of mind -- all of which may have had effect as to appellant's possible motice or lack thereof for commission of the crime.

The significance of the failure to call these witnesses may ruddily be seen from the statements of the prosecutor in his closing argument, where he remarked in a challenging manner upon the absence of such witnesses (241).

Traditionally, the law upon this subject has in summary been that to warrant reversal of a conviction, the defendant must make a showing that in effect no defense at all was offered in his behalf. Anno., 24 A. L. R. 1025, 64 A. L. R. 436. However, it is submitted that in this field of law, as in most, changing times make for changing concepts. A recent California case is perhaps symtomatic of this trend: People v. Welborn, ___ A. C. A. ___, 65 Cal. Rptr. 8 (1968). There the defendant pleaded not guilty and not guilty by reason of insanity, to a charge of murder. By stipulation, in which defendant personally joined, the guilt issue was submitted to the court upon the transcript of the preliminary hearing and of a conversation between defendant and the investigating officer. Both sides waived argument. The court found defendant guilty of murder in the first degree. By stipulation, in which defendant personally joined, the sanity issue was submitted for decision by the court upon the reports of five psychiatrists who had examined the defendant. The court found defendant sane at the time of the homicide and at all times during trial, and

sentenced him to life imprisonment.

Defendant there made a motion for new trial which his counsel submitted without argument. The motion was denied. The record before the appellate court was augmented to include the reports of the five physicians who had examined him.

The California court concluded that the failure of defense counsel to offer in evidence at the guilt phase of the trial the psychiatric evidence that the record shows was available, at the same time neither offering nor arguing any other defense, resulted in a total failure to present the cause of the defendant in any fundamental respect, and thereby deprived him of his constitutional rights to effective aid of counsel. Accordingly the judgment of conviction was reversed. The court took note that the defense of diminished capacity would have been a defense available in the guilt phase of the trial and stated that it was counsel's duty to investigate carefully all defenses of fact or law that may be available to the defendant; and if his failure to do so results in withdrawing a crucial defense from the case, the defendant has not had the assistance to which he is entitled.

An examination of the supplemental affidavit of the appellant (Clk. Tr. 39) shows the brief time appellant was allowed to spend with his trial counsel by way of preparation for trial, his submission to counsel of a five page single-spaced typewritten memorandum detailing the basis for his defense, showing many witnesses who could have testified on his behalf, and that despite all this counsel for appellant at trial chose only to make cursory examination of

appellant on his own behalf, and to call no other witnesses other than character witnesses, and, briefly, the wife of appellant.

It is submitted that it is only necessary to point out that for whatever reason, however arrived at, the record reveals appellant's only defense -- his only hope for exoneration, and all the issues raised thereby, were never brought fully to the attention of the court and jury, this to the complete and pardonable surprise of the appellant.

CONCLUSION

For the reasons stated, it is respectfully submitted that the order denying a new trial and the judgment of conviction should be reversed and the cause remanded with an order directing a new trial.

Respectfully submitted,

HAROLD B. BERNSON and

SANDER L. JOHNSON

By: SANDER L. JOHNSON

Attorneys for Appellant.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Sander L. Johnson
SANDER L. JOHNSON

NO. 22381

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM LORIN BORCHERT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

MAY 6 1968

WM. B. LUCK CLERK

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

RONALD S. MORROW,
Assistant U. S. Attorney,

1200 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

NO. 22381

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM LORIN BORCHERT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

RONALD S. MORROW,
Assistant U. S. Attorney,

1200 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

		Page
I	STATEMENT OF JURISDICTION	1
II	STATUTE INVOLVED	2
III	QUESTIONS PRESENTED	3
IV	STATEMENT OF FACTS	3
V	ARGUMENT	11
	A. THE *WADE* AND *GILBERT* CASES ARE NOT THE LAW TO BE APPLIED IN THE INSTANT CASE	11
	B. APPELLANT HAD A FAIR TRIAL IN THE TOTALITY OF CIRCUMSTANCES	11
	C. APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL	14
CONCLUSION		15
CERTIFICATE		15

TABLE OF AUTHORITIES CITED

Cases	Page
Gilbert v. State of California 388 U.S. 262 (1967)	3, 11
Sherman v. United States 241 F.2d 329 (9th Cir. 1957)	15
Stovall v. Denno 388 U.S. 293 (1967)	11, 12
United States v. Wade 383 U.S. 218 (1968)	3, 11, 13, 14

Codes	
18 U.S.C. 2113	2
18 U.S.C. §2113(a)	1, 2
18 U.S.C. §3231	2
18 U.S.C. §4208(c)	2
28 U.S.C. §1291	2
28 U.S.C. §1294	2

NO. 22381

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM LORIN BORCHERT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION

On March 29, 1967, appellant was indicted in one count by the Federal Grand Jury for the Central District of California for robbery of a National Bank in violation of Title 18, United States Code, Section 2113(a) [C. T. 3]. 1/ Following a trial by jury before the Honorable Irving Hill, United States District Judge, from June 20, 1967, to June 22, 1967, appellant was found guilty.

Appellant was convicted and sentenced on September 11, 1967, to the custody of the Attorney General for twenty years and

---

1/ "C. T." refers to Clerk's Transcript.

for a 90-day study as described in Title 18, United States Code, Section 4208(c) [C. T. 60].

Appellant filed, on September 12, 1967, a Notice of Appeal [C. T. 62].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Sections 2113(a) and 3231.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 18, United States Code, Section 2113 provides in pertinent part:

> "(a) Whoever, by force and violence, or by intimidation, . . . attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association; . . .
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."
>
> "(f) As used in this section the term 'bank' means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution

organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation."

III

QUESTIONS PRESENTED

A. Whether United States v. Wade and Gilbert v. State of California are the law to be applied in the instant case.

B. Whether the totality of the circumstances surrounding the trial deprived appellant of a fair trial.

C. Whether appellant was represented by incompetent counsel.

IV

STATEMENT OF FACTS

On March 15, 1967, at 2:40 P. M., teller Marie Canada, of the La Canada Branch of the Bank of America, La Canada, California, was robbed [R. T. 80], [2] and a later audit revealed a loss of $954.00 [R. T. 110].

Prior to the robbery, on March 15, at 1:25 P. M., pro assistant cashier Marjorie Jones started her lunch period [R. T. 6]. She crossed Oakwood, a street to the side of the subject bank, and

---

2/ "R. T." refers to the Reporter's Transcript.

noticed a white car parked in a northerly direction [R. T. 7]. When she returned from getting a hamburger, ten minutes later, she noticed the same car in the same place [R. T. 7]. When she went upstairs to the lunchroom, she observed, through a window, the same car parked at the curb [R. T. 7-8]. Exhibits 1, 2 and 3 are pictures of the car [R. T. 8]. From Jones' position in the lunchroom, and over a period of the ensuing 50 minutes (to approximately 2:25 P. M.), Jones observed the occupant of the car put on a hat and glasses, grin into the mirror [R. T. 34], pick up an attache case, get out of the driver's side of the car, go around the front of the vehicle, proceed in the direction of the back door of the bank, return to the car in fifteen or twenty seconds, take off the hat and glasses, and drive away [R. T. 12-13]. The occupant of the car would then return the car to the same location [R. T. 13]. He followed the same procedure three times [R. T. 13].

While Jones was in the lunchroom, Margaret Hastie was also there [R. T. 16]. Because of the unusual situation at the curb, the two ladies made written notes of the man's attire, his physical description, his car interior and exterior, and the license number of his car, NGE 890 [R. T. 16, 35].

When Jones returned to work, at 2:25 P. M., she saw the same man at Mrs. Hastie's teller window [R. T. 18]. Upon leaving the window the man looked over the officer's platform, proceeded to the front door, and there, hesitated and looked back at the tellers' area and left [R. T. 18]. After leaving the bank,

the man entered the same car that had been parked alongside the bank, and slowly pulled away in front of the bank [R. T. 20]. Jones was positive that the man at Hastie's window was the same man who had been going through the motions, vis a vis the car, earlier [R. T. 20].

Between 2:40 and 2:45 P. M., Jones saw the same man again [R. T. 20-21]. At this time he was wearing a hat, and glasses, and carrying an attache case [R. T. 21]. Jones saw the man approach the teller position of Mrs. Marie Canada, put down the attache case, and saw Canada, without counting, taking bundles of money and placing them into the attache case [R. T. 22]. At that time she told the manager, Mr. Kieffer, there was a robbery in progress and Kieffer ran out the front door of the bank as the robber was exiting through the rear door [R. T. 23, 33].

Jones identified the defendant as the man described in her testimony [R. T. 25].

Teller Margaret Hastie went to lunch on March 15, 1967, at 1:30 P. M. and watched the man in the Comet and saw the "man was acting rather peculiar" [R. T. 43-44]. She physically wrote down the following details of the man and his car: two-door white Comet with red interior, license number NGE 890, rust spots on right side, dents in front, approximately fifty years of age, medium height and weight, glasses, wearing a dark hat with a red feather [R. T. 45]. Said notes were written while Hastie was in the lunchroom [R. T. 44]. Hastie testified that Exhibits 1, 2 and 3 are pictures of the car she had seen on Oakwood [R. T. 49].

After returning from lunch, the man Hastie "had been watching outside was standing right in front of me" [R. T. 53]. The man obtained change for a twenty dollar bill, and then left in the manner previously described by the witness Jones [R. T. 53-54]. Hastie was positive that the man obtaining the change was the same as the one in the Comet [R. T. 55], except he was not wearing a hat and glasses [R. T. 56].

Approximately ten minutes passed when Hastie saw the same man entering the lobby from the rear door, wearing a hat and glasses, and carrying a black attache case [R. T. 56]. He went to the teller position of Marie Canada [R. T. 56] and put the attache case down in front of Canada [R. T. 73]. When Hastie next looked, the man was heading for the back door in a "rather hurried walk" [R. T. 57]. The same man who was at Canada's position was the same as the one in the Comet and who had cashed the twenty-dollar bill [R. T. 57]. He was also the defendant [R. T. 57].

Marie Canada testified that at 2:40 P. M., on March 15, 1967, she was held up and robbed [R. T. 80]. The robber told her not to sound an alarm or make a sound [R. T. 81]. He placed an attache case on her counter, without either side being flat on the counter, and with his left hand at the base [R. T. 83]. Mrs. Canada was, "absolutely terrified" [R. T. 84]. After identifying the defendant as the robber, Mrs. Canada testified,

> "I am just positive it is the man. The whole time I was being robbed I looked right into his face,

and there isn't any doubt in my mind" [R. T. 86].

Ingrid Corey, a teller at the victim bank testified that on March 15, 1967, around closing time, the defendant said to Marie Canada, who was positioned next to her at a distance of three feet,

> "If you put all your money in here you won't be hurt" [R. T. 97-100].

At the time the defendant was carrying a dark attache case [R. T. 103], wearing glasses, a dark hat with a feather, and a dark suit [R. T. 98]. Between the date of the robbery and the day before her testimony, June 20, 1967, Corey had not seen the defendant [R. T. 104-105]. Ipso facto, she did not attend any lineup.

Harold Scott Zimmerman, assistant cashier at the victim bank [R. T. 107-108], after 2:30 P. M., followed a man in a dark suit and hat, carrying an attache case, out the back door of the bank, and watched him get into a '64 or '65 Comet with license number NGE 890 [R. T. 112-117]. Zimmerman had seen the same man parked outside the bank earlier [R. T. 111-113], from the staff room [R. T. 119]. Zimmerman did not identify the defendant at trial.

Richard Kieffer, manager of the victim bank [R. T. 121-122], testified that on March 15, 1967, his attention was directed to the teller line where he saw a man in a dark suit wearing a hat [R. T. 122]. The man was holding up a teller [R. T. 123]. As the robber walked out the rear of the bank, Kieffer went out the front, and saw the robber getting into a car parked on Oakwood, adjacent

to the bank [R.T. 123]. Upon getting into the car, the robber removed his hat and glasses and drove off [R.T. 123]. At the time Kieffer made Exhibit 11, a note, which bears the following, "COMET NGE 890 - Under six feet - Brown suit - Took off hat as entered car" [R.T. 126-127]. Exhibits 1, 2 and 3 contain photographs of the same car [R.T. 124]. Kieffer saw the witness Zimmerman following the Comet as it drove off [R.T. 128]. Kieffer did not identify the defendant at trial.

George Paine, Jr., a Special Agent of the F.B.I., testified that on March 15, 1967, the appellant arrived at his home in his personal vehicle, which is pictured in Exhibits 1, 2 and 3 [R.T. 130-131]. After advising the appellant of his constitutional rights, and the defendant executed a written waiver thereof [Ex. 13, R.T. 132], the appellant stated that he had been driving a white 1965 Comet bearing California license plate number NGE 890 all day, and had not loaned it to anyone [R.T. 136]. Appellant stated during the interview that he had been to the victim bank earlier that day for the purpose of cashing a five dollar bill [R.T. 137].

Detective Monte McKennon, of the Huntington Beach Police Department, at the time of the arrest, found forty-six one dollar bills up over the left tire well of the appellant's 1965 Comet and 209 dollars in the golf sock of the number four wood [R.T. 154-155].

Following the testimony of Paine, the appellant testified. On March 15, 1967, he was driving the car described in the

previous testimony [R.T. 160]. On that date, he testified, he parked his car in the area described by the bank personnel, adjacent to the side of the bank [R.T. 162], on Oakwood [R.T. 168]. He did put on glasses in the car [R.T. 169], and was outside the bank for some time [R.T. 170]. He testified he went in the front door of the victim bank, went to the first free teller, obtained change, walked out the back door, got into his car, and changed his shoes [R.T. 170]. He testified that when he obtained the change he was wearing neither a hat or glasses [R.T. 173]. After changing his shoes he drove off [R.T. 174]. He further testified that he had the car all day [R.T. 176]; he owed money at the time of the robbery [R.T. 177-178]; he did not return after cashing the bill [R.T. 178]; he did not go in with a hat or glasses [R.T. 178]; and did not have "any encounter" with teller Marie Canada or talk to her [R.T. 178].

On cross examination, the following colloquy took place:

"Q. Were you anywhere near Marie Canada on that day?

"A. If you could say that I was anywhere near her -- if she were in the teller cage as I walked from the front of the bank to the rear of the bank, this is as close as I could have gotten to her.

"MR. MORROW: Your Honor, may I approach the exhibits?

"THE COURT: You may.

BY MR. MORROW:

"Q. Is it a fair statement to say that you walked in the front door pictured on Exhibit 8, walked up to the first teller position, which would be approximately where the "H" is, the red "H" is coming down in Exhibit 6; and from Exhibit 6 you walked out the back door, which is pictured in Exhibit 7? Is that right?

"A. Yes, sir." [R.T. 179].

Further, on cross examination, the appellant admitted that at the time of the robbery he was borrowing money for the purpose of paying interest on other loans [R.T. 180]. At the time of the robbery he had been "bouncing" checks for months [R.T. 180]. Appellant also testified that the last time he had been at the bank was ten days to two weeks prior to the 15th when he cashed the bill at Mrs. Hastie's station [R.T. 182].

After the appellant testified that he was nowhere near Mrs. Canada on the day of the robbery, rebuttal evidence proved that the appellant left his left palm print at the station occupied by Mrs. Canada [R.T. 190-191, 187, 200-204, 212-213, Exs. 15 & 16].

V

ARGUMENT

A. THE WADE AND GILBERT CASES ARE NOT THE LAW TO BE APPLIED IN THE INSTANT CASE.

Appellant was arrested on March 15, 1967, the evening of the subject robbery. If we are to give the slightest weight to the affidavits of appellant then he appeared in a lineup that evening. Stovall v. Denno, 388 U.S. 293 (1967), decided the same date as Wade and Gilbert, June 12, 1967, holds that the rule of Wade shall not be retroactive to lineups held prior to June 12, 1967.

B. APPELLANT HAD A FAIR TRIAL IN THE TOTALITY OF CIRCUMSTANCES.

To paraphrase appellant, he claims that the holding of a lineup colored his entire trial to the point of denying him due process of law.

The appellee has previously admitted that appellant was not appointed counsel at the time of the lineup [C.T. 58]. However, it appears that appellant at trial was not prejudiced by the lineup. Wade held that a lineup was a critical stage of the proceedings and therefore a defendant had a right to have an attorney present for the purpose of gathering information for the purpose of attacking identifications made at trial. Initially, appellant was convicted independently of any possible lineup taint, but if

appellant's counsel believed the allegations of appellant then it appears he was in possession of sufficient material to cross examine the witnesses. Stovall states, at 301-302, that a man may demonstrate that "the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law."

The issue at trial was not whether appellant was on the scene at the bank on the day of the robbery. Appellant admitted it throughout his testimony. The issue was, assuming he was there, whether he did certain things. The witnesses Jones and Hastie described the robber as doing certain things prior to the robbery, namely, being parked in a 1965 white Comet on Oakwood prior to the robbery and putting on glasses, doing paper work, etc. Appellant admitted those things. Further Jones and Hastie testified the robber obtained change from Hastie at a teller position near the front of the bank. Appellant testified identically. The manager, Mr. Kieffer, and the assistant cashier, Mr. Zimmerman, testified the robber left the bank and entered a 1965 white Comet bearing California license plate NGE 890. Neither Kieffer or Zimmerman identified appellant at trial. While appellant did not admit the robber entered the same car, he did admit that he entered the same car on Oakwood and drove off. Again, we see the issue is not who but what, i.e., what appellant did, not whether it was appellant. The witness Corey, who had not seen appellant between the robbery and the day before she testified, therefore, not having attended the lineup, testified that

the appellant was the man who told teller Canada, "If you put all your money in here you won't be hurt."

Further, after appellant admitted he was in the bank he testified he was nowhere near teller Canada or her station. His left palm print, lifted from the counter in front of Canada, conclusively proved what he did. The only conclusion is that the subject of identity was not the issue but what the appellant did was the issue.

The mere fact that Jones and Hastie wrote down their notes and were able to positively state, without reference to appellant, that the man in the Comet was the same as the one who obtained change from Hastie and robbed the bank shows conclusively the independence of their testimony from any possible prejudice at a lineup.

The matters referred to in appellant's opening brief do not amount to prejudice. What appellant apparently alleges is that the others in the lineup were not "ringers" and he was required to make some statements. None of the statements alleged can be considered to be of a testimonial nature and are perfectly proper, United States v. Wade, 383 U.S. 218, 222-223 (1968).

In addition to appellant's counsel having had knowledge of the "prejudicial" events at trial, he was read the identifications made by the attendees [C.T. 57]. Assuming, arguendo, that there was a tainted lineup, appellant had everything that was needed to overcome counsel's absence at the lineup. Nevertheless, the testimony at trial, and the identification of appellant,

were based upon factors independent of the lineup. The transcript itself shows that even if the in-court identifications were tainted, there was harmless error [see Wade, at 242].

C. APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The transcript is replete with extensive and intelligent cross examination of government witnesses. The gist of appellant's instant claim is that he personally wanted more witnesses presented on his behalf. Basically, as shown by the affidavits of appellant at C. T. 30 and 39, the additional witnesses could have shown what appellant normally did on Wednesdays and what he did on the Wednesday of the trial. Additionally, appellant claims there were motive witnesses. No times are set forth that are inconsistent with the case of the prosecution. The matters that appellant "wanted" presented are irrelevant. They do not establish an alibi, but might tend to show that he went about his business after the robbery. Said witnesses would be irrelevant for the reason that normal practices cannot prove what was done at another time.

The mere fact that appellant would have, if he had represented himself, tried the case differently cannot, in any way, be considered as tantamount to showing the incompetency of his attorney. When the evidence not introduced is considered in conjunction with the prosecution's solid case, it is difficult to state

even that the wrong choice was made by trial counsel. Objections would certainly have been made to the matters appellant wanted, and in all likelihood, those objections would have been sustained.

Short of the trial being reduced to a farce, an appellate court will not grant a reversal based upon an allegation of incompetence of counsel. Sherman v. United States, 241 F. 2d 329, 336 (9th Cir. 1957).

VI

CONCLUSION

For the above stated reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

RONALD S. MORROW,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow

RONALD S. MORROW

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

N FRANCISCO-OAKLAND NEWSPAPER GUILD, unincorporated association,

Appellant,

vs.

E TRIBUNE PUBLISHING CO., corporation,

Appellee.

No. 22385

APPELLANT'S OPENING BRIEF

FILED

MAR 29 1968

WM. B. LUCK, CLERK

DARWIN, ROSENTHAL & LEFF
IRWIN LEFF, ESQ.

68 Post Street
San Francisco, Cal. 94104
Telephone: 421-2624

Attorneys for Appellant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

N FRANCISCO-OAKLAND NEWSPAPER GUILD, unincorporated association, Appellant, vs. E TRIBUNE PUBLISHING CO., corporation, Appellee.	)	No. 22385

APPELLANT'S OPENING BRIEF

DARWIN, ROSENTHAL & LEFF
IRWIN LEFF, ESQ.

68 Post Street
San Francisco, Cal. 94104
Telephone: 421-2624

Attorneys for Appellant

TOPICAL INDEX

	Page
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
SPECIFICATION OF ERRORS RELIED ON	5
ARGUMENT	
I. THE COURT CANNOT SUBSTITUTE ITS JUDGMENT FOR THE ARBITRATOR'S ON THE MERITS OF THE CASE, BUT THE COURT CAN REFUSE TO ENFORCE AN AWARD WHICH DOES NOT DRAW ITS ESSENCE FROM THE COLLECTIVE BARGAINING CONTRACT	5
II. THE ARBITRATOR'S AWARD MODIFIES THE COLLECTIVE BARGAINING CONTRACT WHICH PROVIDES A GENERAL INCREASE FOR <u>ALL</u> EMPLOYEES BY DENYING INCREASES TO ALL EMPLOYEES EARNING MORE THAN $200 PER WEEK	7
III. THE ARBITRATOR'S AWARD MODIFYING THE COLLECTIVE BARGAINING CONTRACT IS BASED ON A MISTAKEN READING OF THE CONTRACT WHICH SHOWS ON THE FACE OF THE AWARD	10
CONCLUSION	12
* * *	
CERTIFICATE OF COUNSEL	14

TABLE OF CASES

	Page
Firestone v. United Rubber Workers (1959) 168 Cal.App.2d 444, 335 P.2d 990	7
H. K. Porter Co. v. United Saw, etc. Workers (3rd Cir., 1964) 333 F.2d 596	7
Torrington Co. v. Metal Products Workers (2nd Cir., 1966) 362 F.2d 677	6,7,12
Truck Drivers and Helpers v. Ulry-Talbert Co. (8th Cir., 1964) 330 F.2d 562	7
United Steelworkers of America v. Enterprise Wheel & Car Co. (1960) 363 U.S. 593, 80 S.Ct. 1358	6,7,12

STATUTES

California Code of Civil Procedure, §1286.2(d)	7
United States Code	
Title 28, §1291	1,5
Title 29, §185	1,4

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAN FRANCISCO-OAKLAND NEWSPAPER GUILD, an unincorporated association, Appellant, vs. THE TRIBUNE PUBLISHING CO., a corporation, Appellee.	)	No. 22385

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

This is an action brought by a labor union to vacate an arbitrator's award on the grounds that the award did not draw its essence from and did not show fidelity to the collective bargaining agreement between the union and the employer. The jurisdiction of the District Court is based on §301 of the Labor Management Relations Act, 61 Stat. 136, 29 U.S.C. §185, and the jurisdiction of this Court arises under 28 U.S.C. §1291, which gives this Court jurisdiction of all appeals from final decrees of District Courts of the United States.

STATEMENT OF THE CASE

The Appellant labor union, San Francisco-Oakland Newspaper Guild (hereafter referred to as the "Guild") and the Appellee, The Tribune Publishing Co., Publisher of the Oakland Tribune (hereafter referred to as the "Tribune") have been for a number of years, and are,parties to a collective bargaining agreement. A copy of the latest agreement between the parties, effective from October 16, 1965 to October 16, 1968 is attached to the complaint filed by the Guild (R. 5). The contract's Section XX, Schedule "D" (p.35 of contract) required that the Tribune grant pay increases effective October 16, 1966 of $5.00 per week or higher for all employees covered by the agreement receiving more than $160.00 per week. The Tribune denied that such increases were due to certain employees who had, prior to October 16, 1966, received salary increases to $200.00 per week by operation of the Schedule "A" top minimum provision of the agreement (p. 33 of contract). The Guild grieved,on the grounds of such failure to pay general increases, under the contract grievance procedure (Art. VI, p. 6 of the contract, R. 5), and failing settlement, the matter was taken to arbitration.

A hearing was held before Hubert Wyckoff, Esq., the arbitrator chosen by the parties, on February 6, 1967. The Guild put forth examples of actual salary histories to

illustrate the differences that existed between the parties as to the interpretation of Schedule "D" of Article XX of the Contract (p. 35, R. 5). The Tribune's spokesmen summarized the differences between the parties at the arbitration hearing in the following words [1/] (p. 14 of Transcript of Hearing, transmitted to this Court as part of the Record on Appeal):

> "Mr. Landergren: Now the "Tribune" says that if on the date of October 17, 1965 or on the date of April 17, 1966, an employee has been raised to the $200 minimum and has received a total of at least $16.00, that at that point he is not entitled to any more money over the course of the agreement.
>
> The Guild disputes this position and says: 'Yes, indeed. On October 16, 1966 he is entitled to another $5.00 and on October 15, 1967 he is entitled to another $16.00.'
>
> Mr. Leff: Another $6.00.
>
> Mr. Landergren: Excuse me '...another $6.00'."

Following the hearing, briefs were submitted and on April 7, 1966, Arbitrator Wyckoff rendered his decision. The arbitration award is attached as an exhibit to the Guild's complaint and appears on pages 8 to 17 of the Record on Appeal.

[1/] A second issue between the Guild and the Tribune concerned the payment of "swingman" pay under Article XX (b) (c) and (d) of the contract (p. 33). This was also raised in the arbitration. The arbitrator ruled for the Guild on this matter and no issue is raised in the complaint or in this appeal pertaining to "swingman" pay.

The arbitrator's award ignored the issue that divided the parties (i.e. that general increases were or were not due to individuals who had been increased to $200.00 per week prior to October 16, 1966). Instead, the arbitrator compared the rate a person was earning to the minimum rates in Schedule "A" of the agreement, and if that rate was higher than $200.00, the top minimum contained in Schedule A of Article XX (p. 32 of the contract), then no general increase was to be paid (p. 6 of Award, R. 13). The comparison actually required by Article XX, Schedule "D" (p. 35 of Contract, R. 5) was between a $5.00 general increase and the increase in the minimums, with the general increase being the higher of these two.

The result of the award was to deny a general increase to all employees earning more than $200.00 per week, even though the contract provided an increase of at least $5.00 to all employees. The Guild brought this action in the District Court for the Northern District of California under §301 of the Labor Management Relations Act, 61 Stat. 136, 29 U.S.C. §185, alleging that the arbitrator had exceeded his authority in his award and by reason thereof, the Tribune had breached the collective bargaining agreement. The Tribune and the Guild both moved for summary judgment, and on September 19, 1967,

the Honorable Stanley A. Weigal denied the Guild's and granted the Tribune's motion for summary judgment (R. 70). No opinion was filed by the District Court explaining its decision. On October 16, 1967 the Guild appealed to this Court, whose jurisdiction arises under 28 U.S.C. §1291.

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in denying the Guild's motion for a judgment vacating the arbitrator's award on the ground that the award did not draw its essence from the collective bargaining agreement, but rather modified the agreement of the parties.

2. The District Court erred in concluding that an arbitration award which denied general increases to all employees earning over $200.00 per week did not modify a collective bargaining agreement which provided general increases of at least $5.00 per week to all employees.

ARGUMENT

I

THE COURT CANNOT SUBSTITUTE ITS JUDGMENT FOR THE ARBITRATOR'S ON THE MERITS OF THE CASE, BUT THE COURT CAN REFUSE TO ENFORCE AN AWARD WHICH DOES NOT DRAW ITS ESSENCE FROM THE COLLECTIVE BARGAINING CONTRACT

The Guild is well aware of the Federal labor policy enunciated by the Supreme Court which leaves to an arbitrator the final say on the merits of disputes which

the parties have voluntarily taken to arbitration. But the Supreme Court has also recognized that there are limits on the arbitrator's absolute discretion. In <u>United Steelworkers of America</u> v. <u>Enterprise Wheel and Car Co.</u> (1960) 363 U.S. 593, 597, 80 S.Ct. 1358, the Court wrote:

> "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

The Guild does not ask the Court to substitute its judgment for that of the arbitrator on the merits of this dispute. The Guild does ask the Court to review the award for its fidelity to the contract. This does not denegrate the arbitration process, it strengthens it. As the Court of Appeals for the Second Circuit said in <u>Torrington Company</u> v. <u>Metal Products Workers</u> (2nd Cir. 1966) 362 F.2d 677, 682:

> "Far from having the disruptive effect upon the finality of labor arbitration which results when courts review the 'merits' of a particular remedy devised by an arbitrator, we think that the limited review exercised here will stimulate voluntary resort to labor arbitration and thereby strengthen this important aspect of labor management relations by guaranteeing to the parties a collective bargaining agreement, that they will find in the arbitrator not a 'philosopher king' but one who will resolve their disputes within the framework of the agreement which they negotiated."

The Guild seeks no more than this limited review.

The directive of the Supreme Court in Enterprise Wheel and Car (supra) to vacate awards which are not faithful to the contract has been followed and arbitrator's awards have been vacated in the Second Circuit (Torrington, supra), the Third Circuit (H. K. Porter Co. v. United Saw, etc. Workers (3rd Cir. 1964) 333 F.2d 596), and the Eighth Circuit (Truck Drivers & Helpers v. Ulry-Talbert Co.(8th Cir. 1964) 330 F.2d 562). This Court has not taken a contrary position. This is consistent with California law which permits an award to be vacated if the arbitrator exceeded his powers (Code of Civil Procedure, §1286.2(d), Firestone v. United Rubber Workers (1959, 168 C.A. 2d 444, 448-449, 335 P.2d 990).

II

THE ARBITRATOR'S AWARD MODIFIES THE COLLECTIVE BARGAINING CONTRACT WHICH PROVIDES A GENERAL INCREASE FOR ALL EMPLOYEES BY DENYING GENERAL INCREASES TO ALL EMPLOYEES EARNING MORE THAN $200 PER WEEK

The collective bargaining agreement between the parties (R. 5), deals with two aspects of wages: 1) minimum rates and, 2) general increases. Article XX Schedule "A" deals with minimum rates for various years of experience (p. 32-33), and Article XX, Schedule "D" deals with general

increases (p. 35-36). The dispute that went to the arbitrator concerned Article XX, Schedule "D". The issue was limited to employees with more than 6 years experience, earning more than $160.00 per week. Schedule "D" (b) (p. 35) provides:

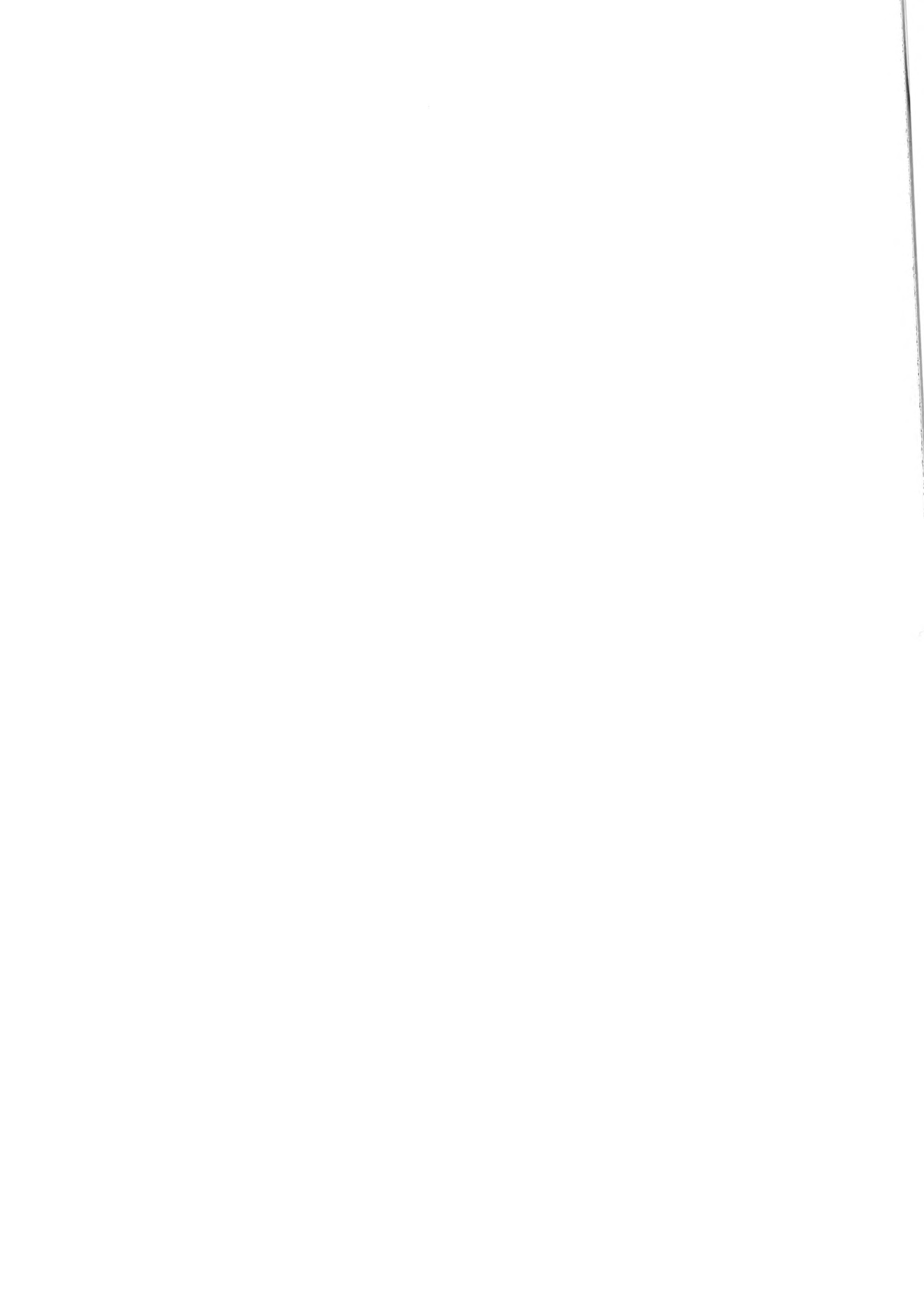
> "Effective October 16, 1966, all employees on the payroll of the employer shall receive an increase in their weekly salary in accordance with the following schedule, or the increase provided under the schedule of minimums contained within this contract, whichever is higher.
>
> "Weekly Salary - - October 16, 1966
>
> | Weekly Salary | October 16, 1966 |
> |---|---|
> | . . . | . . . |
> | $160.00 and over | $5.00" |

The schedule of minimums referred to in this quoted language is contained in Schedule "A". Two tables are involved, the minimum weekly wage rates for more than 5 years' experience (p. 32):

"Effective October 17, 1965	Effective October 16, 1966	Effective October 15,1967
176.25	181.25	187.25"

and the "top minimum" for more than 6 years' experience (p. 33) which required that given percentages of employees be paid a minimum of $200.00 per week.

The interaction between Schedule "D" and Schedule "A" is simply this: unless the increase in the schedule of minimums is <u>greater</u> than $5.00 the general increase is $5.00.



The comparison applies to the amount of increase and has no relevance to the first part of Schedule "D" (b) (p. 35):

> "Effective October 16, 1966, all employees of the employer shall receive an increase in their weekly salary..."

The amount of the increase is $5.00, unless it can be shown that the increase provided under the schedule of minimums is higher. The Guild does not claim, although it might [2/], that the increase in the minimums is greater than $5.00, so the general increase in issue is $5.00

Effective October 16, 1966, in spite of the explicit language of Schedule "D" as reviewed above, the employer failed to grant the required general increase to some employees who were increased to the "top minimum of $200.00 prior to October 16, 1966, claiming that their salary had already gone up more than $16, and this excluded them from Schedule "D" increases. This claim had no support in the language of the agreement nor was there any evidence presented at the hearing (see Transcript of the hearing) of any other agreement of the parties not contained in the contract. The Arbitrator's award made no reference to any other agreement, nor did the Arbitrator appear to rely on one in the award. He relied only on the language of the contract itself.

2/ Although the increase in minimums for more than 5 years' experience was from $176.25 to $181.25, or exactly $5.00 (p.32), for those employees who reached the "top minimum of $200 per week, the increase in minimum was from $176.25 to $200 or $23.75 (p.33). It might be claimed that the general increase should be $23.75 because the minimum increased by this amount. The Guild does not urge this.

The language of the award in issue is found on p. 6 (R. 13) and on p. 9 (R. 16) of the award. "Second" (starting at top of page 6)is one attempt to state the situation in conflict between the parties, i.e. an employee whose salary was increased to $200.00 on April 17, 1966. "Fifth" (starting at bottom of p.8) takes another situation in which the employee's salary was increased on October 17, 1965 to $223.75. In both of these cases, the award holds, the employee will not receive his October 17, 1966 general increase of $5.00 because his rate as of October 17, 1966 is greater than $200.00.

The Guild is forced to acknowledge that if this were a possible interpretation of the contract, even if it were an interpretation that this Court or any other arbitrator would not arrive at, then arbitral finality might require its affirmance. The Guild submits that this award is not a possible interpretation of the contract and was arrived at by the arbitrator only as a result of a critical mistake in his reading of the language of Schedule "D".

III

THE ARBITRATOR'S AWARD MODIFYING THE COLLECTIVE BARGAINING CONTRACT IS BASED ON A MISTAKEN READING OF THE CONTRACT WHICH SHOWS ON THE FACE OF THE AWARD

The critical mistake in the arbitrator's award

which led to this result is revealed in this sentence (middle of p. 6, R. 13):

> "Only the 1965 annual Schedule "D" increase is applicable because this is the only Schedule "D" increase <u>which results in a weekly rate higher than the schedule of minimums which is contained within this contract</u>' ..."
>
> (emphasis supplied)

The arbitrator has compared the <u>rate</u> an employee is earning to the minimums in Schedule "A" - if his rate is higher than the schedule of minimums, then, he receives no Schedule "D" increase.

This, of course, is not what Schedule "D" provides. Schedule "D" compares the "<u>increase</u>" (i.e. <u>not the rate</u>) provided under the schedule of minimums with $5.00. If the <u>increase</u> under the schedule of minimums is higher than $5.00, then that higher amount applies. If not, the general increase is $5.00. Schedule "D" clearly gives the general increase to <u>all</u> employees. The only issue requiring reference to Schedule "A" is the <u>amount</u> of increase - i.e., is the increase more than $5.00 or not?

It is apparent on the face of the award that the arbitrator's decision does not draw its essence from the agreement between the parties. The arbitrator's misreading of Schedule "D" - comparing salary rates to the <u>amount</u> of the minimums rather than comparing $5.00

to the <u>increase</u> in the minimums - modifies the agreement by deleting "all" from Schedule "D" which gives the general increase to "all" employees. The role of the Court, although limited, surely extends far enough to prevent a manifest mistake in reading the language of the contract from resulting in a change in the negotiated contract. This is within the limit the Supreme Court set in <u>Enterprise Wheel and Car</u> (<u>supra</u>) where enforcement of an award is denied if the "arbitrator's words manifest an infidelity" to the collective bargaining agreement (363 U.S. at 597).

<u>CONCLUSION</u>

The Guild reiterates the quotation from the <u>Torrington</u> case set forth above (362 F.2d at 682):

> "Far from having the disruptive effect upon the finality of labor arbitration which results when courts review the "merits" of a particular remedy devised by an arbitrator, we think that the limited review exercised here will stimulate voluntary resort to labor arbitration and thereby strengthen this important aspect of labor-management relations by guaranteeing to the parties to a collective bargaining agreement that they will find in the arbitrator not a 'philosopher king' but one who will resolve their disputes within the framework of the agreement which they negotiated."

At issue is the status of the arbitration system itself as a contributor to industrial stability. If an award, which is contrary to the explicit terms of the

collective bargaining agreement, resulting from a misreading of the agreement, is permitted to stand, the arbitration process will fall into disrepute as a means of settling disputes. This does not require the Court to substitute its own judgment on the merits. The Court need only go so far as to judge the award's fidelity to the agreement.

For the reasons given above, the Court should reverse the judgment of the District Court, vacate and refuse to enforce that part of the award that would deny to employees who are earning more than $200.00 per week the general increases provided in Article XX, Schedule "D" of $5.00 per week, effective October 15, 1966 and $6.00 per week, effective October 15, 1967.

Dated: March 28, 1968.

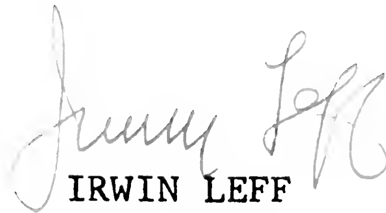
DARWIN, ROSENTHAL & LEFF

By
IRWIN LEFF
Attorneys for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: March 28, 1968
San Francisco, California



IRWIN LEFF

STATE OF CALIFORNIA)
CITY AND COUNTY OF SAN FRANCISCO) ss

ASTRID CARTER, being first duly sworn, upon her oath deposes and says:

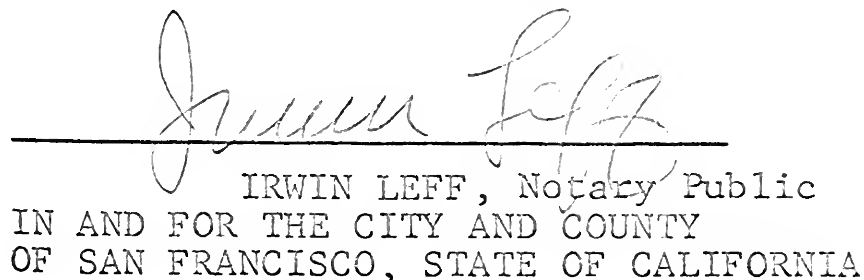
I am a citizen of the United States and employed in the City and County of San Francisco; I am over the age of eighteen years and not a party to the within action; my business address is 68 Post Street, San Francisco, California 94104; I served three copies of the attached APPELLANT'S OPENING BRIEF, by placing said copies in an envelope addressed to the following at his office address:

HAROLD W. JEWETT, JR., ESQ.
General Counsel,
Oakland Tribune,
P. O. Box 509
Oakland, California, 94604

which said envelope was then sealed and postage fully prepaid thereon, was deposited in the United States mail at San Francisco, California, on the date given below.

Astrid Carter

SUBSCRIBED AND SWORN TO before me this 29th day of March, 1968



IRWIN LEFF, Notary Public
IN AND FOR THE CITY AND COUNTY
OF SAN FRANCISCO, STATE OF CALIFORNIA

My commission expires October 1, 1970

Civil No. 22385

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAN FRANCISCO - OAKLAND NEWSPAPER GUILD, an unincorporated association,
Appellant,

vs.

THE TRIBUNE PUBLISHING CO., a corporation,
Appellee,

APPELLEE'S REPLY BRIEF

HAROLD W. JEWETT, JR., ESQ.
1000 Tribune Tower
Oakland, California 94612
Telephone: 273-2717
Attorney for Appellee

FILED
MAY 23 1968
WM. B. LUCK, CLERK

INTER-CITY PRINTING COMPANY, OAKLAND, CALIFORNIA 94607

SUBJECT INDEX

	Page
Jurisdictional Statement	1
Statement of the Case	1
Argument	4
I. Authority of the Courts in Labor Arbitration Suits	4
II. Appellant Contradicts His Position on Specification of Errors Relied on No. 2 (App. Brief P. 5)	17
III. The Cases Cited by Appellant are Not in Point	18
Conclusion	20
Certificate of Counsel	23

TABLE OF AUTHORITIES

Cases

Page

American Radiator & Stand. San. Corp. v. Local 7 of International Bro. of Operative Potters (CA-6; 1966) 358 F. 2d 455 14

AVCO Corp. Electronics and Ordnance Division v. Mitchell (CA-6; 1964) 336 F. 2d 289 14

Firestone v. United Rubber Workers (1959, 168 C.A. 2d 444, 448-449, 335 P. 2d 990) 20

H. K. Porter v. United Saw, etc. Workers (3rd Cir. 1964, 333 F. 2d 596) 19

Lodge No. 12, etc. v. Cameron Iron Works, Inc. (CA-5; 1961) 292 F. 2d 112 .... 15, 16

Machinists v. Cutler-Hammer, Inc. 271 App. Div. 917, 67 NYS 2d 317, aff'd 297 N.Y. 519, 74 NE 2d 464 .... 5, 6

Newark Stereotypers Union #18 v. Newark Morning Ledger Co. (D.C. N.J.; 1966) 261 F. Supp. 832 14

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 1 Law Ed. 2d 972, 77 S. Ct. 912 .... 4, 5

Torrington Company v. Metal Products Workers (2nd Cir. 1966, 362 F. 2d 677) 18

Truck Drivers & Helpers v. Ulry-Talbert Co. (8th Cir. 1964, 330 F. 2d 562) 19

UAW v. Daniel Radiator Corp. of Texas (CA-5; 1964) 328 F. 2d 614 14

United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 4 L. Ed. 2d 1403, 80 S. Ct. 1343 .... 5, 6, 7

United Steelworkers of America v. Enterprise Wheel & Car Co., 363 U.S. 593, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 .... 10, 13, 18

United Steelworkers of America v. Warrior and Gulf Nav. Co., 363 U.S. 574, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 .... 7, 19

Statutes

Labor Management Relations Act, §301, 61 Stat. 136 .... 1, 6

§301(a) 61 Stats. 156 4

United States Code, Title 28, §1291 1

Title 29, §185 1

Civil No. 22385

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAN FRANCISCO - OAKLAND NEWSPAPER GUILD, an unincorporated association,
Appellant,

vs.

THE TRIBUNE PUBLISHING CO., a corporation,
Appellee,

APPELLEE'S REPLY BRIEF

JURISDICTIONAL STATEMENT

This is an action brought by a labor union to vacate a portion of an arbitrator's award on the grounds that the arbitrator exceeded his authority. The jurisdiction of the District Court is based on §301 of the Labor Management Relations Act, 61 Stat. 136, 29 U.S.C. §185, and the jurisdiction of this Court arises under 28 U.S.C. §1291, which gives this Court jurisdiction of all appeals from a final decree of District Courts of the United States.

STATEMENT OF THE CASE

1. Appellant labor union, hereinafter called the "Guild," and Appellee newspaper, hereinafter called the "Tribune," are parties to a labor contract dated April 6, 1966. (R. 5)

2. During the term of said contract, disagreement arose between the parties as to the correct interpretation of certain of the wage provisions of Article XX thereof. (R. 5, P. 35)

3. The Guild moved this disagreement to final and binding arbitration under the provisions of Article VI (R. 5, P. 6) of the labor contract and the matter was heard on February 6, 1967, before Hubert Wyckoff, Esq., one of the panel of arbitrators provided for therein.

4. At the hearing the Guild framed its position in the form of four separate grievances on behalf of individually named employees (Bill Doyle, Tom Flynn, Bill Britton and Harvey Schwartz) and others similarly situated. (R. 28)

5. Arbitrator Wyckoff issued his award on April 6, 1967, (R. 8-17) and the effect thereof was to deny the Doyle and Flynn grievances, but to sustain the Guild on the Britton and Schwartz grievances. Pursuant to the latter, the Tribune increased the weekly salaries for and paid out substantial amounts of back pay to Britton and Schwartz and some thir-

teen additional employees similarly situated. (R. 28, 29)

6. The present action is a proceeding by the Guild to overturn that portion of the Wyckoff award which denies the Doyle and Flynn grievances. No challenge is raised as to the arbitrator's authority in respect of his award upholding the Britton and Schwartz grievances. The proceeding was begun in the District Court for the Northern District of California and therein the Honorable Stanley A. Weigel denied the Guild's and granted the Tribune's motion for summary judgment on September 20, 1967. (R. 53) Thereafter, on October 16, 1967, the Guild appealed to this Court. (R. 72)

7. The issue raised by the Doyle and Flynn grievances is limited to employees classified under *Schedule "A,"* specifically, those provided for under the heading *"Schedule 'A' Top Minimum (more than 6 years' experience)"*—as shown at Article XX of the labor contract. (R. 5, P. 32, 33) This issue can be expressed variously in terms of its effect on employee wage rates, but the parties' basic disagreement was whether wage increases required under the *Schedule "A" Top Minimum* percentage schedule (R. 5, P. 33) could be offset against wage increases required under *Schedule "D."* (R. 5, P. 35, 36) The Tribune position was "for" the offset, the Guild's "against;" this was the question which the parties

submitted to arbitrator Wyckoff's jurisdiction and which he determined in the exercise thereof.

ARGUMENT

I.

AUTHORITY OF THE COURTS IN LABOR ARBITRATION SUITS.

The authority of this court to compel arbitration and to confirm arbitration awards, and its limited authority to vacate such awards, is derived from Section 301(a) of the Labor-Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C.A. Sec. 185 (a), and the interpretation thereof by the United States Supreme Court which in 1956 enunciated the rule that specific enforcement would be applicable to labor arbitration agreements and labor arbitration awards pursuant to Section 301(a). *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 1 Law Ed. 2d 972, 77 Supreme Court 912. The Supreme Court went on to hold that the policy to be applied in enforcing arbitration agreements was reflected in the national labor laws. Generally, the federal labor policy is "to promote industrial stabilization through the collective bargaining agreements." Arbitration is considered a major factor in achieving industrial peace. *Textile Workers* v. *Lincoln Mills, supra,* 353 U.S. 448, 454, 455.

Subsequent to the *Lincoln Mills* decision the state courts, as well as the federal courts, temporarily

embarked on a course which tended to reduce the efficacy of labor arbitration agreements and awards thereunder. Misunderstanding the true meaning of *Lincoln Mills*, these courts assumed broad powers of review over all labor arbitration awards. Symbolic of this trend was *Machinists* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 NYS 2d 317, aff'd 297 N.Y. 519, 74 NE 2d 464. The *Cutler-Hammer* case held that "if the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration." *Machinists* v. *Cutler-Hammer, Inc., supra*, 271 App. Div. 918. In 1960 the Supreme Court in three sweeping decisions overruled the *Cutler-Hammer* doctrine, explained the *Lincoln Mills* decision, and extended the scope of arbitration in the labor relations field to unprecedented limits. These three landmark decisions are today commonly referred to as the *Steelworkers* trilogy. These cases are discussed immediately below.

1. *United Steelworkers* v. *American Mfg. Co.*

In *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 4 L. Ed. 2d 1403, 80 Sup. Ct. 1343, the Supreme Court overruled decisions of the District Court and the Court of Appeals for the Sixth Circuit in which those courts had held that a "frivolous, patently baseless grievance" was not subject to arbitration. The grievant in that case had sought

reinstatement subsequent to industrial injury and subsequent to a workmen's compensation permanent disability settlement of 25%. The employer urged that the grievant was estopped from arbitrating his reinstatement claim and that the grievance was patently frivolous because of the 25% permanent disability. The Supreme Court reversed the lower court's holding that it was no business of the courts to weigh the merits of the grievance.

In holding that the reinstatement grievance was a matter to be determined by the arbitrator, the Court *specifically* overruled the *Cutler-Hammer* doctrine, *supra*. The Supreme Court held that the policy of the Labor-Management Relations Act could only be effectuated "if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *American Mfg. Co., supra*, 363 U. S. 566, and further stated:

> "Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator"—"The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." *American Mfg. Co., supra*, at 568.

Then the Court went on to say in reference to the *Cutler-Hammer* case:

> "The lower courts in the instant case had a like preoccupation with ordinary contract law. The collective agreement requires arbitration of claims that courts might be unwilling to entertain. In the context of the plant or industry the grievance may assume proportions of which judges are ignorant. Yet, the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious." *American Mfg. Co., supra,* at 567.

2. *United Steelworkers of America* v. *Warrior and Gulf Nav. Co.*

In the *Warrior and Gulf case,* 363 U.S. 574, 4 L. Ed. 2d 1409, 80 Supreme Court, 1347, the Supreme Court again overruled lower federal courts. The grievants there were members of a union which sought to arbitrate the question of "contracting-out" work which had previously been done by members of the Union. The Company resisted arbitration and urged that its management rights clause precluded the union from arbitrating matters which were "strictly the function of management.'

In discussing the arbitrability of the contracting-out grievance the Court compared labor arbitration to arbitration in ordinary civil cases:

> "In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitra-

tion of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. *For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.*

"The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. See *Schulman, Reason, Contract, and Law and Labor Relations*, 68 Harvard Law Rev. 999, 1004, 1005. The collective agreement covers the whole employment relationship. It calls into being a new common law—a common law of a particular industry or of a particular plant." *Warrior & Gulf Nav. Co., supra*, at p. 579. (Emphasis supplied.)

The Court then discussed the role of an arbitrator and the tools an arbitrator uses in performing his functions within the "industrial self-government."

"Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is ac-

tually a vehicle by which meaning and content are given to the collective bargaining agreement"—"The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." *(Warrior & Gulf Co., supra,* at p. 581 and 582.)

The Court finally concluded that it could not be said "with positive assurance" that the question of

"contracting-out" was necssarily excepted from the grievance procedure.

> "The grievance alleged that the contracting-out was a violation of the collective bargaining agreement. There was, therefore, a dispute 'as to the meaning and application of the provisions of this Agreement' which the parties had agreed would be determined by arbitration,
>
> "The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting-out in the present case violated the agreement is the question. It is a question for the arbiter, not for the courts." *(Warrior & Gulf Nav. Co., supra,* at p. 585).

3. *United Steelworkers* v. *Enterprise Corp.*

In *United Steelworkers* v. *Enterprise Corporation,* 363 U.S. 593, 4 L. Ed. 2d 1424, 80 Supreme Court 1358, a union won an arbitration award and petitioned the District Court for enforcement. Causing the arbitration was the discharge of a group of employees who had left their jobs in protest against the earlier discharge of a fellow worker. A grievance protesting the discharge of the protesting employees followed. The arbitrator found the discharges to be without cause, and ordered reinstatement of the workers with the loss of ten days pay, to correspond

to a ten days' suspension, which the arbitrator considered the employees deserved.

However, prior to the issuance of the arbitration award, the collective bargaining agreement expired. The arbitrator rejected the contention that the expiration of the agreement barred reinstatement of the employees. The District Court agreed, but the Court of Appeals reversed on three grounds: (1) that the failure of the award to specify the amounts to be deducted from back pay, rendered the award unenforceable (and then went on to state that this error could be remedied by requiring the parties to complete their arbitration); (2) that the back pay award subsequent to the expiration of a collective bargaining agreement rendered the award unenforceable; and (3) requiring reinstatement of discharged employees subsequent to an expired collective bargaining agreement also rendered the arbitration award unenforceable.

The Supreme Court reversed the judgment of the Court of Appeals, but sent the matter back to the arbitrator to determine the exact amounts due under the arbitrator's award.

> "*The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.* The federal policy of settling labor disputes by arbitration would be undermined

if courts had the final say on the merits of the awards. As we stated in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 4 L. Ed. 2d 1409, 9-S. Ct. 1347, decided this day, the *arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process.* They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.

"When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations." (*Enterprise Corp., supra,* 363 U.S. 596, 597.) (Emphasis supplied.)

"As we there emphasized (United Steelworkers v. American Mfg. Co.) the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which is bargained for; and as far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." (*Enterprise Corp., supra,* 363 U.S. 599.)

These three trilogy decisions have been discussed and examined in depth, first to point out their significant impact on traditional contract arbitration law, and secondly, to illustrate the underlying policy of the labor laws moving the Court to act as it did.

All too often a party seeking to avoid the unfavorable results of a labor arbitration award, as is the case with the appellant here, will emphasize familiar language in the *United Steelworkers* v. *Enterprise* case, *supra,* stating that "the award is legitimate only so long as it draws its *essence* from the collective bargaining agreement. When the arbitrator's words *manifest* an *infidelity to this obligation,* courts have no choice but to refuse enforcement of the award." *Enterprise Corp., supra,* 363 U.S. 597 (emphasis supplied). This language, so often quoted for the purpose of attacking the merits of an award, is a misapplication of the true purpose of the trilogy decisions, as is clear upon careful reading. We respectfully suggest that the Arbitrator's "fidelity to his obligation" is always fully met so long as the arbitrator does not act in a clearly arbitrary or capricious manner in rendering an award. We believe this to be the true *essence* of the national labor policy as construed by the courts in considering labor arbitration agreements and awards.

4. *Federal case law since the Steelworkers trilogy.*

Federal case law since the trilogy decisions endorses the use of arbitration in all disputes arising out of the contact between labor and management in their collective bargaining relationship. The courts have conscientiously recognized their extremely limited jurisdiction in this area and have consistently applied the broad principles and puroses of the *Steelworker* trilogy decisions. The cases are too numerous to mention all of them, but pertinent to the instant case are the following decisions:

(a) *UAW* v. *Daniel Radiator Corp. of Texas*, (CA-5; 1964) 328 F. 2d 614. The court held that settlements of grievances are matters exclusively to be determined by the arbitrator.

(b) *AVCO Corp. Electronics and Ordnance Division v. Mitchell* (CA-6; 1964), 336 F. 2d 289. The court held that the question of timeliness of grievances concerns interpretation of the contract and is a matter exclusively for the arbitrator.

(c) *Newark Stereotypers Union No. 18* v. *Newark Morning Ledger Co.*, (D.C. N.J.; 1966) 261 F. Supp. 832. An arbitration award may not be examined for alleged mistakes of law and erroneous evaluation of evidence.

(d) In *American Radiator & Stand. San. Corp.* v. *Local 7 of International Bro. of Operative Potters*, (CA-6; 1966) 358 F. 2d 455, the employer resisted

arbitration on the grounds that one of the Union's grievances claimed there was a new job. The company contended that the creation of new jobs under the management rights provision was strictly a prerogative of the Company. The court ordered arbitration.

> "It is not the province of the courts to determine issues of fact which bear upon the questions of whether a particular section of the contract has been violated. This is the function of the arbitrator. *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403. It is therefore our opinion that the question of whether new jobs have been created is an issue of fact which bears upon the issue of whether there has been a contract violation as charged by the union."

Lodge No. 12, etc. v. *Cameron Iron Works, Inc.*, (CA-5; 1961) 292 F. 2d 112. In the *Cameron Iron Works* case the court correctly held that the remedy of back pay in addition to reinstatement as a consequence for an illegal discharge was a matter exclusively for the arbitrator. This decision demonstrates fidelity to the Supreme Court's pronouncements. The Court correctly related the holding to the trilogy cases:

> "From the trilogy opinions several things seem clear. The merits of the controversy may not

> be looked to by a court for the purpose of declaring that a legal interpretation of the contract would not support the conclusion sought. *This may not be done directly, nor may it be done under the quise of determining that the matter is outside the agreement to arbitrate.* The acceptance of (any such) view would require courts, even under the standard arbitration to review the merits of every construction of the contract. *This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would never be final.*" 363 U.S. 593, at pages 598-599, 80 S. Ct. 1358, at page 136; *Cameron Iron Works Inc., supra,* at p. 118. (Emphasis supplied.)

Finally, the Court in *Cameron* emphasized that it had an obligation to defer to the informed judgment of the arbitrator once he had rendered his award.

> "Likewise, whether it is thought to be a part of the substantive right or more a part of the grievance procedure, in the absence of clearly restrictive language, great latitude must be allowed in fashioning the appropriate remedy constituting the arbitrator's 'decision'." *Cameron Iron Works, Inc., supra,* at p. 119.

II.

APPELLANT CONTRADICTS HIS POSITION ON SPECIFICATION OF ERRORS RELIED ON NO. 2 (APP. BRIEF P. 5).

There is no evidence that the award denied general increases to all employees earning over $200.00 and it did not do so. Appellant's original complaint correctly refers to "some," not "all" employees earning over $200.00 (par. VI, R. 2).

The award speaks for itself, but the fact is that it denies such employees an increase only if they had already received (by operation of the *Schedule "A" Top Minimum* percentage schedule) (R. 5, P. 32, 33) increases totaling $16.00 or more, that is, increases which equal or exceed the total of the three general increases of $5.00, $5.00 and $6.00 provided for by *Schedule "D."* (R. 5, P. 35) In other words the arbitrator ruled that if the increase received under *Schedule "A"* (R. 5, P. 33) equaled or exceeded that required by *Schedule "D,"* (R. 5, P. 35) the former could be offset against the latter. This is borne out by Appellant's brief at Page 9 thereof.

Appellant also has no evidence for his statement (Brief, P. 9) that the arbitrator "relied only on the language of the contract itself."

The arbitration award does not state what points the arbitrator relied on in reaching his decision, but as the Transcript of the Hearing shows there was

testimony by the chief negotiators for both parties and numerous documents were submitted in evidence by each side.

III.

THE CASES CITED BY APPELLANT ARE NOT IN POINT.

1. *United Steelworkers of America* v. *Enterprise Wheel and Car Co.* (supra).

2. *Torrington Company* v. *Metal Products Workers* (2nd Cir. 1966, 362 F. 2d 677).

This appeal presented the question as to whether an arbitrator exceeded his authority in ruling that the agreement contained an implied provision, based upon prior practice between the parties. Torrington allowed its employees up to an hour off with pay to vote on election day. This policy had been instituted by the Company and was not part of the collective bargaining agreement. The court at page 680 said:

> "Therefore, we hold that the question of an arbitrator's authority is subject to judicial review, and that the arbitrator's decision that he has authority should not be accepted when the reviewing court can clearly perceive that he has derived that authority from sources outside the collective bargaining agreement at issue."

In this case Torrington had revoked the above policy by newsletter in 1962 and by formal notice

to the union in April, 1963, and the court felt that it was within the employer's discretion to make such a change, since the narrow arbitration clause in the previous collective bargaining agreement precluded resort to arbitration by the union and, therefore, held that the arbitrator had abused his authority when he attempted to read into the agreement this contractual relationship.

3. *H. K. Porter* v. *United Saw, etc. Workers* (3rd Cir. 1964, 333 F. 2d 596).

This case is not in point but reiterates the Court's view in *United Steel Workers* v. *Warrior Gulf Navigation Company,* supra, at p. 600.

> "The labor arbitrator's course of law is not confined to the express provisions of the contract as the industrial common law—the practice of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. . . ."

4. *Truck Drivers & Helpers* v. *Ulry-Talbert Co.* (8th Cir. 1964, 330 F. 2d 562).

In this case the Company discharged a truck driver who altered his time cards. The case was taken to arbitration and the arbitrator found that the truck driver was dishonest but held that the penalty of discharge was too severe and reinstated him. The court held that the arbitrator violated the terms of

the contract, as the contract clearly left the matter of discharge with the Company.

5. *Firestone* v. *United Rubber Workers* (1959, 168 C.A. 2d 444, 448-449, 335 P. 2d 990).

Where an agreement between a union and a company provided that when an employee in Classification A was temporarily assigned to Classification B, he should receive the rate of pay of Classification A or B, whichever was higher, but did not provide that a Board of Arbitration could decide that while the employee was temporarily employed in Classification B, the employee should receive the compensation in Classification C, the Board had no power to decide the rate of pay other than in accord with the powers expressly conferred on it.

CONCLUSION

The arbitrator was authorized by the provisions of the labor contract (Article VI, P. 6-8) to make a final and binding determination on all issues raised by the written grievances.

In the instant case he was asked to determine whether the appellant's or the appellee's interpretation of certain contract provisions was correct. In finding for one of the parties, he expressly discharged the specific duty he had been asked to perform.

Appellant's appeal, viewed realistically, is no more than an attempt to re-arbitrate the merits of the

parties' contract interpretation dispute because of its dissatisfaction with arbitrator Wyckoff's award.

To overturn the present award on such grounds would be contrary to the principles of collective bargaining and the national labor policy favoring arbitration as enunciated in the trilogy cases.

For the above reasons, this Court should affirm the judgment of the District Court.

Dated: May 14, 1968, Oakland, California.

Respectfully submitted,

HAROLD W. JEWETT, JR., ESQ.

Attorney for Appellee

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for theNinth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: May 14, 1968, Oakland, California.

HAROLD W. JEWETT, JR.

JUN 19 1968

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAN FRANCISCO-OAKLAND NEWSPAPER GUILD, an unincorporated association,

Appellant,

vs.

THE TRIBUNE PUBLISHING CO., a corporation,

Appellee.

No. 22385

APPELLANT'S REPLY BRIEF

DARWIN, ROSENTHAL & LEFF
IRWIN LEFF, ESQ.

68 Post Street
San Francisco, Cal. 94104
Telephone: 421-2624

Attorneys for Appellant

FILED

JUN 12 1968

WM. B. LUCK, CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAN FRANCISCO-OAKLAND NEWSPAPER GUILD, an unincorporated association, Appellant, vs. THE TRIBUNE PUBLISHING CO., a corporation, Appellee.	)	No. 22385

APPELLANT'S REPLY BRIEF

That the policy of the federal courts is to exercise a very limited review of arbitrator's awards is not a proposition with which Appellant takes issue. This is the gist of the first thirteen pages of Appellee's argument (Appellee's Brief, pp 4-16) and it misses completely the main thrust of Appellant's brief. Within the limited area of review established by the Supreme Court[1]

[1] "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." United Steelworkers of America v. Enterprise Wheel and Car Co. (1960) 363 U.S. 593,597, 80 S.Ct. 1358.

there exists the responsibility of the Court to see that the arbitrator's decision is based on the collective bargaining agreement between the parties.

Appellee's answer to our analysis of the arbitrator's decision and its infidelity to the collective bargaining agreement is a scant page and a bit (Appellee's Brief, pp 17-18) which sounds as though it is talking about some award other than the one here involved, which appears in the record (R.8 - R.17). It is noteworthy that in the entire section of its brief answering our analysis of the award and the contract (Appellee's Brief, pp 17-18), Appellee does not cite a single page of the award to support its statements of what the award contains.

The award does speak for itself, and it plainly provides that the annual increase is to be paid only if the rate the employee is earning is lower than the $200 which is the top minimum in Art. XX(a) of Contract. The arbitrator wrote:

> "Only the 1965 annual Schedule "D" increase is applicable because this is the only Schedule "D" increase which results in a weekly rate higher than "the schedule of minimums which is contained within this contract," that is, $181.25 is higher than $176.25 but neither $186.25 nor $192.25 is higher than $200. In other words "the schedule of minimums" referred to by Schedule "D" is the entire schedule of minimums contained within Article XX(a) of the contract which includes both the top minimum of $200 for employees with more than 6 years experience as well as the lower minimums for employees with more than 5, 4, 3, 2 and 1 years' experience and less than 1 year's experience." (Award, p.6, R.13)

This is obviously directly contrary to the contract which provides an annual increase to <u>all</u> employees, as of October 16, 1966, of at least $5.00, if his weekly salary is over $160.00 (P.35 of Contract, R.5).

The effect of the arbitrator's award is to re-write the contract by denying the annual increase to all employees earning over $200. Appellee chooses to read the award to support its interpretation - that <u>some</u> employees earning over $200 get the annual increase but not others (Appellee's Brief, p.17). This unilaterally determined gloss of the award does not correct the basic fault in the award - that it modified the agreement between the parties on which the award must be based.

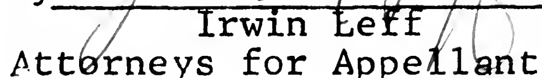
Appellant's detailed analysis of the award and the contract (Opening Brief, pp 7-12) need not be re-peated. Appellee has failed to meet in its brief the points there made. Appellee's sole argument is that this Court may not look at the award to determine whether it draws its essence from the collective bargaining agreement. The Supreme Court has spoken to the contrary, requiring that the Court refuse enforcement of the award where it does not draw its essence from the agreement. (<u>Enterprise Wheel & Car, Supra</u>)

Appellant seeks the upholding of the arbitration process, not the contrary. If an award which is contrary to the explicit terms of the collective bargaining

contract is permitted to stand, the arbitration process will fall into disrepute as a means of settling disputes. This does not require the Court to substitute its own judgment on the merits. The Court need only go so far as to judge the award's fidelity to the agreement.

Dated: June 3, 1968.

DARWIN, ROSENTHAL & LEFF

By 
Irwin Leff
Attorneys for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: June 3, 1968
San Francisco, California

Irwin Leff

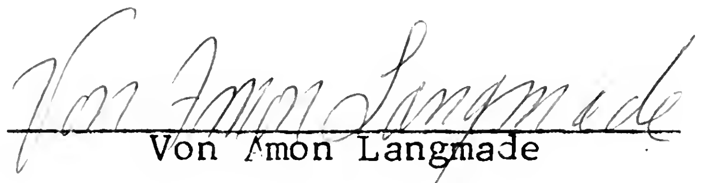
STATE OF CALIFORNIA)
CITY AND COUNTY OF SAN FRANCISCO) ss

VON AMON LANGMADE, being first duly sworn, upon her oath deposes and says:

I am a citizen of the United States and employed in the City and County of San Francisco; I am over the age of eighteen years and not a party to the within action; my business address is 68 Post Street, San Francisco, California 94104; I served three copies of the attached APPELLANT'S REPLY BRIEF, by placing said copies in an envelope addressed to the following at his office address:

HAROLD W. JEWETT, JR., ESQ.
General Counsel,
Oakland Tribune,
P. O. Box 509
Oakland, California 94604

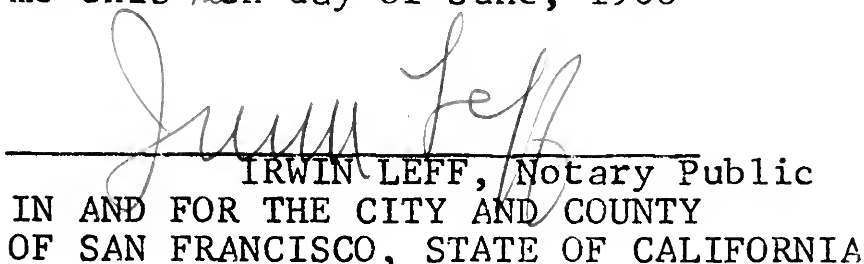
which said envelope was then sealed and postage fully prepaid thereon, was deposited in the United States mail at San Francisco, California, on the date given below.



Von Amon Langmade

SUBSCRIBED AND SWORN TO before

me this 12th day of June, 1968



IRWIN LEFF, Notary Public
IN AND FOR THE CITY AND COUNTY
OF SAN FRANCISCO, STATE OF CALIFORNIA

My commission expires October 1, 1970

NO. 22386

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN S. AUSTIN,

Appellant,

vs.

UNITED STATES OF AMERICA, ET AL.,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney

RAYMOND F. ZVETINA,
Assistant U.S. Attorney

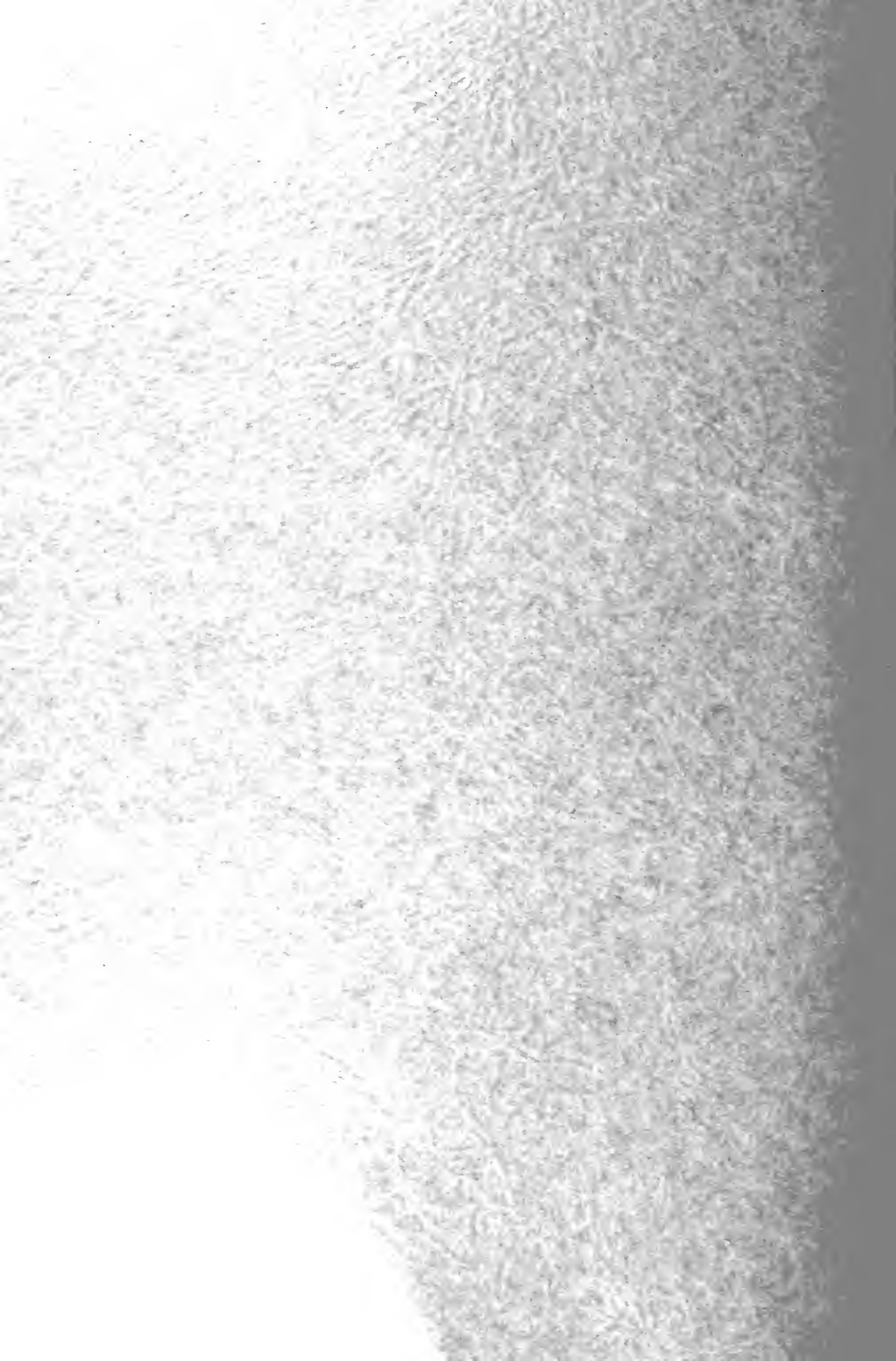
325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America.

FILED

JUN 7 1968

WM. B. LUCK, CLERK



NO. 22386

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN S. AUSTIN,

Appellant,

vs.

UNITED STATES OF AMERICA, ET AL.,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney

RAYMOND F. ZVETINA,
Assistant U.S. Attorney

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

	Page
Table of Authorities	ii
I. STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION	1
II. STATUTES INVOLVED	4
III. QUESTIONS PRESENTED	6
IV. SUMMARY OF ARGUMENT	6
V. ARGUMENT	7
A. JUDICIAL DISPENSATION WITH THE REQUIREMENT OF EXHAUSTION OF ADMINISTRATIVE REMEDIES REQUIRES BOTH IRREPARABLE INJURY TO PLAINTIFF AND LIKELIHOOD OF SUCCESS ON THE MERITS	7
B. THE PLAINTIFF IS UNLIKELY TO PREVAIL UPON THE MERITS OF HIS ATTACK ON HIS MEXICAN FELONY CONVICTION AND ALLEGED "RIGGING" OF EVIDENCE BY UNITED STATES AGENTS	11
1. PLAINTIFF WAS NOT LEGALLY ENTRAPPED	11
2. PLAINTIFF'S MEXICAN CONVICTION IS NOT SUBJECT TO COLLATERAL ATTACK	13
VI. CONCLUSION	16
CERTIFICATE	17

TABLE OF AUTHORITIES

(Cases)

	Page
Giammario v. Hurney, 311 F.2d 285 (C.A. 3, 1962)	14
Hilton v. Guyot, 159 U.S. 113 (1895)	14
Indian Refining Co. v. Valvoline Oil Co. 75 F.2d 797 (C.A. 7, 1935)	14
Ingenohl v. Olsen & Co., 273 U.S. 541 (1927)	14
Nelson v. Miller 373 F.2d 474 (C.A. 3, 1967)	10
Ng Sui Wing v. United States, 46 F.2d 755 (C.A. 7, 1931)	14
Robinson v. United States, 379 F.2d 338 (C.A. 9, 1967)	13
Schwartz v. Covington, 341 F.2d 537 (C.A. 9, 1965)	8,9,10
Sherman v. United States, 356 U.S. 369 (1958)	12
Sohm v. Fowler, 365 F. 2d 915 (C.A.D.C., 1966)	7,8,9,10
Sorrells v. United States, 287 U.S. 435 (1932)	12
Spann v. Compania Mexicana Radiodifusora Fronteriza, S.A., 41 F.Supp. 907 (N.D. Tex. 1941), aff'd. 131 F.2d 609 (C.A. 5, 1942)	14

Statutes

Title 10, United States Code, Section 1552	4

TABLE OF AUTHORITIES (continued)

Regulations	Page
Title 32, Code of Federal Regulations, Sections 723 et seq.	9

NO. 22386

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN S. AUSTIN,

Appellant,

vs.

UNITED STATES OF AMERICA, ET AL.,

Appellee.

APPELLEE'S BRIEF

I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION.

The Statement of the Facts of The Case as set forth in Appellant's Brief (pp. 3-4) is deemed inadequate as a basis for discussion of the legal issues involved. It omits several significant procedural facts which are essential for a complete understanding of the case in its present posture, and it is characterized by the use of such emotional and almost frenzied terminology as to render it more tract than fact.

The government, therefore, feels compelled to submit its own independent summary of the pertinent procedural facts, as follows:

On April 12, 1967, plaintiff-appellant (hereinafter referred to as plaintiff) filed in the United States District Court for the Southern District

of California a Complaint for Declaratory Judgment, Injunction and Temporary Restraining Order, which sought, in essence, to restrain the United States Navy from separating plaintiff from the service with an undesirable discharge pursuant to the recommendation of an Administrative Discharge Board, which found that plaintiff had been convicted by foreign civil authorities of an offense for which the maximum penalty under the Uniform Code of Military Justice is confinement in excess of one year. Under Naval regulations, such conviction by civil authorities (foreign or domestic) is a basis for an undesirable discharge (Exhibit H to plaintiff's complaint, C-10312).

Stripped of unessentials, the Complaint alleges that the plaintiff is an enlisted man serving on active duty in the United States Navy under an enlistment contract commencing November 27, 1961, and expiring November 27, 1967. On June 19, 1965, he was arrested in Mexico by officers of the Mexican Federal Police, and was subsequently convicted of a narcotic offense and sentenced to four years imprisonment and a 4,000 peso fine.

At oral argument on the Government's Motion to Dismiss [Memorandum of Decision Dismissing the Action, p. 3] it was conceded that plaintiff served sixteen months of the Mexican sentence, paid a fine, appealed, with resultant affirmance of the judgment, and sought executive clemency, which was denied.

On November 15, 1966, an Administrative Discharge Board was convened at the Naval Missile Center, Point Magu, California, which

considered evidence of plaintiff's conviction, heard plaintiff's testimony, and recommended an undesirable discharge by reason of misconduct. [Plaintiff was represented by retained civilian counsel at this proceeding.]

On January 25, 1967, the Chief of Naval Personnel directed plaintiff's Commanding Officer to separate plaintiff from service with an undesirable discharge by reason of misconduct, which direction was ordered held in abeyance pending results of the instant court action.

In addition to the above-distillation of facts, the Complaint alleges numerous irregularities and acts of misconduct by the Mexican police and court which are claimed to be in violation of plaintiff's rights under the Mexican Constitution. Additionally it is charged that plaintiff's arrest was based upon evidence which was "rigged" by agents of the United States Federal Bureau of Narcotics.

Finally, there are allegations of manifold irregularities in the institution, conduct and conclusions of the Administrative Discharge Board.

In response to plaintiff's Complaint the United States, on June 15, 1967, filed a Motion to Dismiss, which, pursuant to a hearing, was granted by the District Court in a Memorandum of Decision Dismissing the Action filed on November 7, 1967.

The District Court dismissal was predicated upon failure of the plaintiff to exhaust his administrative remedies. While recognizing that an undesirable discharge qualifies as irreparable injury, the court determined that there was insufficient likelihood that plaintiff would prevail on the merits to justify judicial short-circuiting of the administrative process.

The instant appeal followed.

The Complaint was filed under 28 U. S. C. §2201 and 2202, 5 U.S.C. §1009, 10 U.S.C. §1162 and 1163, and Articles V and VI of the Constitution of the United States.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based upon 28 U.S.C. §1291 and 28 U.S.C. §1294.

II.

STATUTES INVOLVED

Title 10, United States Code, Section 1552, reads in part as follows:

> "(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.
>
> (b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three

years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be . . . .

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under

this section relate.

(e) . . . .

(f) . . . ."

III.

QUESTIONS PRESENTED

1. Should the plaintiff be required to exhaust his administrative remedies before seeking judicial review of his discharge?

2. Would plaintiff be likely to prevail upon the merits of his claim in the District Court?

3. Can plaintiff's felony conviction by a Mexican Court which had jurisdiction over his person be collaterally attacked?

4. Was plaintiff legally "entrapped" by agents of the Federal Bureau of Narcotics?

IV.

SUMMARY OF ARGUMENT

Exhaustion of administrative remedies is a fundamental principle of the law, predicated upon sound considerations of the separation of powers and judicial conservation of energy. While the principle is not applied with wooden inflexibility, the exceptions are infrequent and require a conjunction of irreparable injury to the plaintiff and a likelihood of success on the merits before the judiciary will intervene.

Plaintiff seeks to avoid an undesirable discharge on the basis of alleged irregularities in his Mexican conviction, entrapment by agents of the Federal Bureau of Narcotics, and errors in the conduct of the Administrative Discharge Board. Insofar as the Mexican conviction is concerned, it is not open to collateral attack in this proceeding. The record establishes that the agents of the Federal Bureau of Narcotics merely presented plaintiff the opportunity for the commission of an offense and there was no legal "entrapment." Errors in the proceedings of the Administrative Discharge Board are properly susceptible to administrative review.

Hence, since the likelihood of plaintiff's success on the merits is not substantial, the instant case is not an appropriate one for dispensing with the customary administrative remedies in favor of judicial intervention.

V.

ARGUMENT

A. JUDICIAL DISPENSATION WITH THE REQUIREMENT OF EXHAUSTION OF ADMINISTRATIVE REMEDIES REQUIRES BOTH IRREPARABLE INJURY TO PLAINTIFF AND LIKELIHOOD OF SUCCESS ON THE MERITS.

The principle of exhaustion of administrative remedies before resort to the courts is deeply ingrained in our jurisprudential system. It is based upon sound policies of the separation of powers and conservation of judicial energies. Sohm v. Fowler, 365 F.2d 915, 917 (C.A.D.C., 1966).

Additionally, the judicious application of the principle tends to discourage forum shopping, frequently obviates unnecessary resolution of constitutional issues, promotes uniform and non-sporadic elaboration of administrative regulations, and effectively utilizes specialized administrative knowledge and acquired expertise. Sohm v. Fowler, 365 F.2d 915, 917-919 (C.A.D.C., 1966); Nelson v. Miller, 373 F.2d 474, 479 (C.A. 3, 1967).

While the courts have not applied the principle with procrustean rigidity, departure from the norm requiring exhaustion of administrative remedies is relatively rare.

A significant example of such a departure is found in this Court's decision in Schwartz v. Covington, 341 F.2d 537 (C.A. 9, 1965). There a serviceman sought to enjoin the Army from ordering his discharge under dishonorable conditions. The Court upheld the action of the District Court in granting a stay of the discharge pending exhaustion of military remedies and, if necessary, District Court review. The ruling was predicated upon the coexistence of two factors: (1) irreparable harm to plaintiff by virtue of a dishonorable discharge if the stay was not granted, and (2) the likelihood that plaintiff would prevail upon the merits of his appeal to the District Court (insubstantial evidence of homosexual activity).

It is clear from the Schwartz case that this Court sanctioned only a limited departure from the exhaustion requirement (although the discharge was stayed, completion of review by the Army Board of Correction of Military Records before court review was specifically contemplated), and then only upon a showing of "special circumstances," as this Court's criteria

have come to be known. See *Sohm* v. *Fowler*, 365 F.2d 915 (C.A.D.C. 1966).

While there has been some variation in the approach of the circuits to the role of the District Court in discharge cases prior to exhaustion of post-discharge administrative review, *Nelson* v. *Miller*, 373 F.2d 474, 478-479 (C.A. 3, 1957), no case has been found sanctioning immediate district court review on the merits under these circumstances, or even suggesting its propriety, absent irreparable harm and a patently meritorious claim.

It is therefore apparent, under the *Schwartz* test, that if an adequate post-discharge administrative remedy is available to plaintiff, he is required to pursue that remedy before obtaining judicial review, unless he can establish both irreparable harm and the likelihood of prevailing on the merits in the District Court.

The existence and adequacy of review by the Board for Correction of Naval Records, 10 U.S.C. §1552, 32 C.F.R. §723 et. seq., is admirably detailed in *Nelson* v. *Miller*, 373 F.2d 474, 478-479 (C.A. 3, 1967). In brief, the Board has authority to review military records to correct error or injustice, and to recommend restoration of rate with back pay. Quite evidently, the remedy is not a futile one.

Insofar as the requirement of irreparable harm is concerned, the District Court, with some degree of skepticism, conceded *arguendo* that the test was met by virtue of plaintiff's impending dishonorable discharge.

[Memorandum of Decision Dismissing the Action, p. 3]. The government similarly, for purposes of this appeal, concedes the element of irreparable damage.

What is not conceded, however, and what distinguishes the instant case from Schwartz v. Covington, 341 F.2d 537 (C.A. 9, 1965), upon which plaintiff relies so heavily, is the element of patent merit, or likelihood of success of plaintiff's claim. As will be developed more fully under the next argument heading, it is the respectful contention of the government that there is an insufficiant likelihood that plaintiff will prevail in his collateral attack upon his Mexican conviction to justify judicial intervention before the administrative process has run its full course.

Additionally, as was the case in Sohm v. Fowler, 365 F.2d 915 (C.A.D.C. 1966) and Nelson v. Miller, 373 F.2d 474 (C.A. 3, 1967), many of the claims advanced by plaintiff deal with interpretation of Naval regulations, or relate to procedures of the Administrative Discharge Board, the primary authority for the interpretation of which lies within the Navy's own appellate system. Also, deference to Naval administrative authorities in this case comports with the basic policy of avoiding the unnecessary resolution of constitutional questions. These considerations in addition to those previously advanced, militate in favor of the District Court's disinclination to short-circuit the administrative process.

B. THE PLAINTIFF IS UNLIKELY TO PREVAIL UPON THE MERITS OF HIS ATTACK ON HIS MEXICAN FELONY CONVICTION AND ALLEGED "RIGGING" OF EVIDENCE BY UNITED STATES AGENTS.

1. PLAINTIFF WAS NOT LEGALLY ENTRAPPED.

Plaintiff's conclusory allegation in paragraph VII of the Complaint that his arrest was procured upon evidence "rigged" by members of the Federal Bureau of Narcotics is repeated without elaboration in his brief at page 3. In support of this charge, there is attached to the Complaint, as Exhibit B, the report of Federal Narcotics Agent Harry J. Watson, which sets forth in some detail the background and circumstances of plaintiff's arrest. In essence they are as follows:

In the latter partof 1963 the Federal Bureau of Narcotics received information that plaintiff was the contact man for a ring of Canadian-Mexican heroin smugglers. Plaintiff indicated to a state undercover agent his willingness to arrange for the purchase of heroin in Tijuana, Mexico, and similarly to undercover agent Watson.

On June 18, 1965, plaintiff travelled to Tijuana with Agent Watson for the purpose of procuring six to eight ounces of heroin from plaintiff's contact. His conversation indicated both a familiarity with the narcotics trade and a prior course of narcotics dealing.

After unuscessful efforts to locate his contact, plaintiff introduced the agent to the contact's partner, giving assurances that the agent could be

trusted.

That evening plaintiff stayed in a motel in Tijuana while the agent purported to return to San Diego. The following morning plaintiff advised Agent Watson that his contact had arrived and would return to the motel at 11:30 a.m. After some unsuccessful efforts to arrange for delivery of the heroin, plaintiff, his contact (Isaac Eduardo Duarte), and the agent returned to the motel to await delivery. While waiting, Duarte told the Agent in plaintiff's presence that he had had many business dealings with plaintiff, and each time the heroin was good and was paid for promptly. At 5:00 p.m. Duarte left the room and returned in one half hour, whereupon he delivered the heroin to Agent Watson in plaintiff's presence. The arrest followed. At the time of the arrest plaintiff held four ounces of heroin in his hand.

It is clear from the foregoing recitation that the appellation "rigged", in the sense of legal entrapment, is grossly inapposite to the facts. It is fundamental that entrapment is not made out unless the accused was induced to commit the offense solely because of the urgings and blandishments of the government agents.

Sherman v. United States, 356 U.S. 369 (1958).

Where the accused has the predisposition to commit the offense, and the agents merely provide the opportunity for its commission, there is no entrapment.

Sorrells v. United States, 287 U.S. 435-441 (1932);

Robinson v. United States, 379 F.2d 338 (C.A. 9, 1967).

As the facts clearly demonstrate, the plaintiff manifested a ready willingness to deal in narcotics, a familiarity with the jargon and mechanics of the trade, and prior active participation in similar narcotic dealings. Such is not the stuff of which entrapment is fashioned.

The District Court properly concluded, therefore, that the plaintiff's allegations respecting "rigged" evidence, even if true, would afford no ground for relief. [Memorandum of Decision Dismissing the Action, p. 5].

2. PLAINTIFF'S MEXICAN CONVICTION IS NOT SUBJECT TO COLLATERAL ATTACK.

In an argument bristling with colorful invective, but notably unencumbered by a single citation of authority, plaintiff declares his Mexican conviction invalid. [Appellant's Brief, pp. 7-8]. Nowhere, however, either in the Complaint or in his brief does plaintiff allege or even suggest that the court which tried him lacked jurisdiction of the subject matter or of the person of plaintiff. While the vehemence of plaintiff's denunciation of the rape of the goddess of justice perpetrated by Mexican courts is substantial, and his equation of Mexican justice with that of North Viet Nam and Nazi Germany interesting, such a metaphorical approach to serious questions of conflicts of laws is hardly informative.

The government respectfully submits that neither the District Court nor the Administrative Discharge Board was required to entertain a collateral

attack upon plaintiff's Mexican conviction.

While the law in this area is by no means crystal clear, the general rule seems to be that foreign judgments in personam (including criminal convictions) will be regarded as conclusive if decided upon the merits by a foreign court having jurisdiction of the parties and subject matter. 50 C. J.S. §904-906;

Spann v. Compania Mexicana Radiodifusora Fronteriza, S.A., 41 F. Supp. 907 (N.D. Tex. 1941), aff'd., 131 F.2d 609 (C.A. 5, 1942). See also Indian Refining Co. v. Valvoline Oil Co., 75 F.2d 797 (C.A. 7, 1935) and Ingenohl v. Olsen and Co., 273 U.S. 541 (1927).

The Supreme Court in 1895 discussed the concept of "comity" upon which a form of "full faith and credit" to a foreign judgment may be given in Hilton v. Guyot, 159 U.S. 113, and while holding under the particular facts that a French judgment need not be accorded credit where there was no reciprocity by French Courts, the Court pointed out [pp. 202-203] that differences in the procedures of the foreign court and in the method of examining witnesses and the admissability of evidence were not grounds for failure to recognize the validity of the judgment.

There is also a notable reluctance on the part of the courts to permit retrial of or collateral attack upon criminal convictions which form the basis of administrative action. See Giammario v. Hurney, 311 F.2d 285 (C.A. 3, 1962); Ng Sui Wing v. United States, 46 F.2d 775 (C.A. 7, 1931).

Neither the Administrative Review Board, nor the District Court, (nor, for that matter, this Court), is equipped to sit in review of the actions

of a foreign court proceeding within its own jurisdiction. Unlike the laws of sister states, developed along roughly parallel lines in the common-law tradition, the laws of foreign states are difficult to ascertain, being written in a foreign tongue and developed in unfamiliar ways, and are not easily accessible. An administrative board or court, venturing into the thicket of quasi-appellate review of a foreign criminal conviction, would inevitably lose its way. Nor can we adopt the simple expedient of superimposing American concepts of justice upon the foreign proceedings, for such an approach would deny the validity of any law but our own (a degree of legal vanity we have never yielded to) and would be practically unworkable.

It was presumably for these reasons that the District Court, perhaps cavalierly, yet rightly, brushed aside plaintiff's attack on his conviction with the cursory remark that , "It is unlikely that the Appellate Court would interest itself in Mexican procedures carried on under Mexican law." [Memorandum of Decision Dismissing Action, p. 4].

VI.

CONCLUSION

For the reasons presented herein and apparent on the record, it is respectfully submitted that the judgment of the District Court be affirmed.

Respectfully submitted,

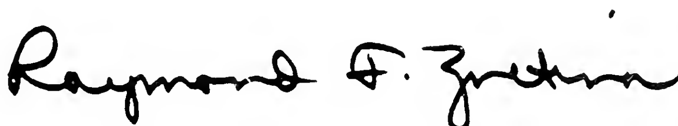
EDWIN L. MILLER, JR.,
United States Attorney

RAYMOND F. ZVETINA,
Assistant U.S. Attorney

Attorneys for Appellee
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



RAYMOND F. ZVETINA

IN THE

United States Court of Appeals

For the Ninth Circuit

NO. 22387

WESTERN TERMINAL COMPANY, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR THE TAXPAYER-APPELLANT

SCOTT B. LUKINS
FRANCIS J. BUTLER
BUTLER & LUKINS

725 Lincoln Bldg.,
Spokane, Washington 99201
Attorney for Taxpayer-Appellant

FILED

MAR 7 1968

WM. B. LUCK, CLERK

C. W. HILL PRINTERS

MAR 3 1969

IN THE

United States Court of Appeals

For the Ninth Circuit

NO. 22387

WESTERN TERMINAL COMPANY, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR THE TAXPAYER-APPELLANT

SCOTT B. LUKINS
FRANCIS J. BUTLER
BUTLER & LUKINS

725 Lincoln Bldg.,
Spokane, Washington 99201

Attorney for Taxpayer-Appellant

TABLE OF CONTENTS

Page

Citations iii

Opinion Below 1

Jurisdiction 1

Questions Presented 2

Statement of the Case 2

1. Facts known at December 31, 1960 3

2. Facts known after December 31, 1960 8

Specification of errors relied upon 9

Argument 10

1. The District Court erred in failing to conclude that upon the basis of facts known to the Taxpayer-Appellant at December 31, 1960, Taxpayer-Apellant's estimate of a five year useful life for its fuel storage facility was reasonable 10

   A. Facts known to the Taxpayer at December 31, 1960 10

   B. The Statute authorizing the awarding of five year contracts 12

   C. Negotiated Contract ASP. 17894 15

   D. The Statute and Regulations 17

Page

E. The relevant Treasury Regulations, as applied to the present case, require that the reasonableness of any claim for depreciation, including the estimate of useful life pertinent thereto, be determined upon the basis of facts known to exist at the end of the calendar year 1960 21

F. Cases involving Military Facilities 22

G. Summary 28

2. The District Court erred in holding that it was permissible to use hindsight evidence in determining the useful life of taxpayer's fuel storage facility 30

A. The District Court's Reasoning 30

B. The Mutual Fertilizer Company Case 34

C. Other Cases rejecting the use of Hindsight Evidence 35

D. Summary 37

Conclusion 38

Certificate 38

Appendix "A" 39

Appendix "B" 48

CITATIONS

Cases: Page

Bonwit Teller and Co. v. Commissioner, 52 F. 2d 531 (C.A. 2, 1931) 30

Alpin J. Cameron, et al., 8 B.T.A. 120 (1927) 36

Cohn v. United States, 259 F. 2d 371 (C.A. 1958) 23

Commissioner v. Cleveland Adolph Mayor Realty Corporation, 160 F. 2d 1012 (C.A. 6, 1947) 22, 36

Commissioner v. Mutual Fertilizer Co. 159 F.2d 470 (C.A. 5, 1947) 22, 34

Fireman's Insurance Co., 30 B.T.A. 1004 36

Fort Lewis Dairy v. Squire (W.D. Wash. 1954) unreported (1954-1, U.S.T.C. 9396 (1954) 26

Fribourg Navigation Co. Inc. v. Commissioner 383 U.S. 272, 86 S.Ct. 682 (1966) 25, 26

Halvering v. Winmill, 305 U.S. 79, 59 S.Ct. 45 (1938) 22

Kennecott Copper Corp. v. United States, 347 F. 2d 275, Ct. Cl. (1965) 37

Lake Charles Naval Stores, 25 B.T.A. 173 (1932) 22

Leonard Refineries, Inc. 11 T.C. 1000 (1948) 22

Pacific National Bank v. Commissioner, 91 F. 2d 103 (C.A. 9, 1937) 22

Pasadena City Lines, Inc., 23 T.C. 34 (1954) 30

John Paul Riddell, 12 T.C.M. 44 (1953) 23

United States Cartridge Co. v. United States, 284 U.S. 511, 52 S. Ct. 243 (1932) 27

United States v. Wagner Electric Mfg. Co. 61 F. 2d 204 (C.A. 8, 1932) 27

Regulations: Page

Treasury Regulation 62, Article 165 (1922 Ed.) 22

Treasury Regulation 1.167 (26 C.F.R. Sec. 1.167) 18, 19, 20, 21, 26, 34, 36

Statutes:

Section 416 of Public Law 968 (70 Stat. at Large, 991, 1018, 10 U.S.C. 2388 .... 12, 15, 17, 28, 30

Section 113 of Revenue Act of 1932 36

Section 124 Internal Revenue Code of 1939 (26 U.S.C. (1944 Ed.) Sec. 124) 24

Section 167 Internal Revenue Code of 1954 (26 U.S.C (1960 Ed.) Sec. 167) 7, 17, 18, 22

Section 168 Internal Revenue Code of 1954 (26 U.S.C. (1960 Ed.) Sec. 168) 24

Section 178 Internal Revenue Code of 1954 (26 U.S.C. (1960 Ed.) Sec. 178) 17, 30

Section 1016 Internal Revenue Code of 1954 (26 U.S.C. (1960 Ed.) Sec. 1016) 27

Miscellaneous:

Wilkins, Important Developments in Deductability of Repairs, Depreciation; Depletion Allowances; 6 New York University Institute of Taxation 637, 642-654 (1948) 37

Senate Report 665, 72nd Congress, 1st Sess. 29. 36

Senate Report 2364, 84th Congress, 2d Sess. pages 28-29 12

Hearings, Committee on Armed Services of the House of Representatives on Sundry Legislation Affecting the Naval and Military Establishments, 84th Congress 2d Sess., pages 6809-6810 13

IN THE

UNITED STATES COURT OF APPEALS

for the Ninth Circuit

No. 22387

Western Terminal Company, *Appellant*

vs.

United States of America, *Appellee*

On Appeal from the Judgment of the United States District Court for the Eastern District of Washington

BRIEF FOR THE TAXPAYER-APPELLANT

OPINION BELOW

The Findings of Fact and Conclusions of Law of the Court below has not been officially reported. The Findings of Fact and Conclusions of Law are recited in the Record of the District Court (2R.24-28).

JURISDICTION

This appeal involves federal income taxes for the year 1960. On June 3, 1964, the taxpayer paid a deficiency in its income taxes for 1960 of $203,222.05 (1R.2,11). A timely claim for refund was thereafter filed which was rejected

on April 2, 1965 (1R.2,11) within the time provided in Section 6532 of the Internal Revenue Code of 1954, and on March 18, 1966, taxpayer brought this timely action in the District Court for recovery of the taxes paid (1R.1,11). Jurisdiction was conferred on the District Court by 28 U.S.C. Section 1346(a). The judgment of the District Court in favor of the Government was entered on September 1, 1967 (1R. 9). Within thirty days thereafter, on September 26, 1967, the taxpayer filed a Notice of Appeal (1R.30). Jurisdiction is conferred on this Court by 28 U.S.C. Section 1391.

QUESTIONS PRESENTED

1. Did the District Court err in holding that the taxpayer's fuel storage facility located near Grand Forks, North Dakota, had a 20 year useful life at the end of 1960?
2. Did the District Court err in holding that it was proper to consider hindsight evidence in determining the useful life of taxpayer's fuel storage facility?

STATEMENT OF THE CASE

Most of the basic facts are not in dispute. These facts appear in the Pretrial Conference Order (1R.10-15) in paragraphs 1 through 13, 15 through 17 and 20 of the District Court's Findings of Fact and Conclusions of Law (1R.24-27), and in the several exhibits introduced into evidence at the trial by the Taxpayer-Appellant and the Appellee.

The facts fall into two basic groups, those which were

known at December 31, 1960 and those which were not known at December 31, 1960 but arose thereafter.

1. Facts known at December 31, 1960

The following facts were known at December 31, 1960:

(a) Plaintiff was organized on February 11, 1959 for the purpose of bidding and, if successful, constructing and operating a fuel storage facility to be located adjacent to the Grand Forks Air Force Base at Grand Forks, North Dakota. (1R.24)

(b) By transmittal letter dated February 21, 1959, Plaintiff submitted to the Government its request for proposal in respect of a 670,000 barrel capacity fuel storage facility to be located near Grand Fords, North Dakota. Included among the schedules to such request for proposal was a cost estimate in which the cost of the facility was amortized over a five year useful life (Plaintiff's Exhibit 3) (2R.70).

(c) On April 22, 1959, Plaintiff was awarded a contract for storing and handling Government-owned petroleum products at Grand Forks, North Dakota (Plaintiff's Exhibit 5). This contract called for the construction of a fuel storage facility with a 670,000 barrel capacity (2R.66-72).

(d) Following the start of construction of the above mentioned facility, the Plaintiff received a telegram from the Defense Fuel Supply Center requesting it to stop construction of the 670,000 barrel capacity facility and further re-

questing it to come to Washington, D. C. to enter into discussions regarding changes in the contract terms and conditions to cover a reduction in the total amount of fuel storage tankage to be provided. (Plaintiff's Exhibit 6) (2R.74-75).

(e) As a result of the negotiations which followed, a new contract, dated May 8, 1959, was entered into for the construction and operation of a fuel storage facility at the same location but having a capacity of 270,000 barrels; (2R.75) (Plaintiff's Exhibit 1). The contract was for a period of five years. Pursuant to the terms of the contract, the Government was granted the option and successive options to renew for three additional periods of five years each or a total of 15 years. (1R.25) (Section VIII, Plaintiff's Exhibit 1).

(f) Under the terms of the contract, Plaintiff was to be paid a monthly use charge computed at the rate of $2.36 per barrel per year of storage capacity. This use charge was to be reduced to 59¢ per barrel per year of storage capacity during the first option renewal period and 44¢ per barrel per year of capacity during the two succeeding option renewal periods. (Section I, Plaintiff's Exhibit 1). The reason for the substantially larger use charge during the first five year period was to permit Plaintiff to recover its investment in the fuel storage facility, its operating expenses, and a profit. (2R.81-82) (1R.25). The smaller use charges during the renewal periods were intended to cover only the normal operating costs and a small profit. (2R.68,82).

(g) Pursuant to paragraph C of Section XII of the contract, the Government reserved the right to terminate the contract for its convenience by paying the Plaintiff the following sums:

(i) During the first year after the facility had been accepted by the government .... $1,875,000.

(ii) During the second year of the contract period .... $1,650,000.

(iii) During the third year of the contract period .... $1,237,500.

(iv) During the fourth year of the contract period .... $ 825,000.

(v) During the fifth year of the contract period .... $ 412,500.

(vi) During any renewal period .... thirty percent of the unexpired portion of the use charges due at the date of termination under any five-year renewal period at the use charge rates for the particular renewal period during which termination occurs.

(h) The contract could be terminated without cost to the Government at the end of the first five year period and at the end of any renewal period (Par. C of Section XII of Plaintiff's Exhibit 1).

(i) Under the terms of the contract, a total of $3,186,000 was to be paid to Plaintiff during the initial five year pe-

riod. This sum was based upon the following estimates of cost, operating expenses and profit:

Construction Cost	$1,875,000
Termination Settlement	162,000
Operating Costs—5 years @ $124,500 per year	622,500
Interest on Construction	326,625
Total Estimated Costs	$2,986,125
Profit	199,875
Firm five year price	$3,186,000

(j) Assuming the contract was not later modified and that the Government exercised all three of its successive five-year options, Plaintiff would receive additional payments of $1,984,500 during the three successive option renewal periods (1R.25).

(k) Funds for the construction of Plaintiff's fuel storage facility were borrowed from the Old National Bank of Spokane, The National Bank of Minneapolis, and the Red River Bank of Grand Forks, North Dakota. (2R.95) Prior to the lending of these funds, Plaintiff delivered to the lending banks a pro-forma financial statement setting forth the projected cash flow under the contract. This pro-forma statement was based upon a five year estimate of useful life for the fuel storage facility. (Plaintiff's Exhibit 4) (2R.190-196, 228-229).

(i) Construction of Plaintiff's fuel storage facility was be-

gun on April 27, 1959 and was completed on September 1, 1959. The fuel storage facility was to be used for the receiving, storing and distribution of petroleum products to the Grand Forks Air Force Base. This base was located some 15 miles from the site of Plaintiff's fuel storage facility. (1R.26)

(m) The cost of Plaintiff's fuel storage facility was as follows:

Land	$ 35,935.10
Terminal Facilities	794,266.66
Pipelines — off site	294,505.60
Total	$1,124,467.36

(n) The cost of the depreciable assets included in Plaintiff's fuel storage facility was $1,088,532.26 (1R.26).

(o) Plaintiff's fuel storage facility constituted property used in its trade or business of a type subject to an allowance for depreciation under the provisions of Section 167 of the Internal Revenue Code of 1954 (1R.26).

(p) Plaintiff at all times during the year 1960 was the owner of the fuel storage facility (1R.26).

(q) On January 1, 1960, the depreciable assets included in Plaintiff's fuel storage facility had an adjusted basis of $1,034,264.88. (1R.26)

(r) Plaintiff made a timely election to compute the depreciation deduction to be allowed to it on the declining balance method using a rate twice that allowed by the straight line method.

(s) Plaintiff's fuel storage facility would have no commercial use upon termination of use by the Government. Its only value would be as scrap value. (1R.27) (2R.100)

(t) Prior to the end of 1960, it had been announced that the last of the B-52 bombers was then "on the line" and that there was not going to be an extension of the B-52 contract. (2R.206)

2. Facts known after December 31, 1960.

The following facts became known or occurred after December 31, 1960.

(a) On January 13, 1961, Plaintiff sold its fuel storage facility for $1,934,250. (1R.26)

(b) On June 24, 1964 the Defense Fuel Supply Center requested Plaintiff to submit written proposals to it regarding possible amendments to the storage contract. If agreed to these amendments would have reduced the storage to be provided by the taxpayer from 270,000 to 215,000 barrels, change the use charge to be charged for the storage and change the length of the renewal period or periods from three periods of five years each to a single period of one year, a single period of three years, or a single period of five years, with options to renew on the

part of the Government for two one-year periods, fourteen one-year periods, four three year periods, or two five year periods. (Plaintiff's Exhibit 7)
(c) During the negotiations that followed Plaintiff offered to reduce the renewal price for the first five-year renewal period if the Government would relinquish its final two options to renew. (1R.27). The Government refused this offer: (1R.27).

(d) On September 1, 1964, the Government exercised its option to renew the fuel storage contract for the first of the three successive five-year renewal periods (1R.26) (Defendant's Exhibit 108)

(e) At the time the Government exercised its first five-year renewal option the Air Force requirements for fuel storage at the Grand Forks fuel storage facility totalled 208,000 barrels of capacity and were for a period of three years. (2R.137,170)

(f) The Government terminated its fuel storage contract at Helena, Montana prior to the completion of five years. (2R.146) Several other storage or pipeline facilities used by the Government have either been terminated or are presently being only sparingly used for the storage of Government owned petroleum products. (2R.206-210)

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred in failing to conclude that upon the basis of facts known to the Taxpayer-Appellant

at December 31, 1960, Taxpayer-Appellant's estimate of a five year useful life for its fuel storage facility was reasonable.

2. The District Court erred in holding that it was permissible to use hindsight evidence in determining the useful life of Taxpayer-Appellant's fuel storage facility.

ARGUMENT

1. The District Court erred in failing to conclude that upon the basis of facts known to the Taxpayer-Appellant at December 31, 1960, Taxpayer-Appellant's estimate of a five year useful life for its fuel storage facility was reasonable.

A. Facts known to the Taxpayer at December 31, 1960

The facts which were known to the Taxpayer-Appellant at December 31, 1960 and upon which it based its estimate of the useful life of its Grand Forks, North Dakota fuel storage facility, are contained in the transcript of proceedings in this case, the Exhibits introduced into evidence and the District Court's Pre Trial Conference Order. Briefly, these facts include the Taxpayer's knowledge that its contract with the Government was for a five-year period; that while the Government also possessed successive options to renew the contract for three additional periods of five years each, there was no assurance or even likely prospect that it would do so; that the preliminary estimates of construction costs which the taxpayer had submitted to the Government had been premised upon a five year use-

ful life estimate; that the projected earnings and cash flow statements which it had submitted to its banker, the Old National Bank of Spokane, had likewise been premised on a five year estimate of useful life; that the terms of its loan from that bank, the National Bank of Minneapolis and the Red River Bank, required it to repay its construction loan over the five year period of its contract with the Government; and that its fuel storage facility would have no commercial or secondary use at the termination of the Government contract, however long that might be.

The military posture of the United States at the end of 1960, which is a matter of judicial knowledge, was one in which the United States was at war only in the cold war sense of seeking to maintain and extend its retaliatory military capacity against a possible air attack by the Soviet Union. While possession of the atomic bomb and the ability of the United States Air Force to deliver this bomb had been a focal point of our defense effort, a rapid change was taking place with the advent of the Minuteman Guided Missle system and the positioning of missle sites along the northern border of the United States. In addition, it was generally felt that the manned bomber would soon be obsolete as a retaliatory weapon and that its use would be continued only until such time as the country's missle system had become fully operative. These facts led the officers of the Taxpayer to assume that it would not be prudent or businesslike to depend on the Government to renew its storage contract beyond the initial five year period. (2R.93,197-199)

B. The Statute authorizing the awarding of five-year contracts.

Section 416 of Public Law 968, 70 Stat. at Large 991, 1018, 10 U.S.C. 2388, was enacted into law on August 3, 1956, and provides as follows:

> "*Section 416.* The secretaries of the military departments are authorized to contract for the storage, handling and distribution of liquid fuels for periods not exceeding five years, with options to renew for additional periods, not exceeding five years, for a total not to exceed 20 years. This authority is limited to facilities which conform to the criteria prescribed by the Secretary of Defense for protection, including disbursal and also are included in a program approved by the Secretary of Defense for the protection of petroleum facilities * * *"

The purpose of this provision was explained by the Senate Committee on Armed Services in its report (S.Rept. No. 2364, 84th Congress, 2d Sess., pages 28-29) as follows:

> The committee was informed that a year ago it was determined after study that a large percentage of our reserve stocks of petroleum, particularly aviation gasoline and jet fuel, are located in highly vulnerable areas of the United States. The Department, based on this determination, has attempted to achieve a program of dispersing that storage so that it will be outside the vulnerable areas and, therefore, will be available in the event of an emergency. The fuel stocks referred to are those intended for use in important missions immediately following the outbreak of hostilities. They are intended also for immediate shipment to overseas destinations. The study which the Department made of the situation in which it found itself indicated that there was little or nothing which could be done by the

> Department to rectify the situation. *For example, it found that the commercial petroleum storage industry was unwilling to undertake a program of dispersal outside of normal commercial areas.* The principal objection of the industries appeared to spring from the fact that under present laws the leasing of such dispersed facilities by the Department of Defense would be limited to 1 year. *The cost involved in such a dispersal program made it fully unattractive to the industries under this circumstance.* (italics supplied)

This explanation appears to have originated in the testimony of Col. C. A. Rogers who gave the following statement to the House of Representatives Committee on Armed Services (Hearings, Committee on Armed Services of the House of Representatives on Sundry Legislation Affecting the Naval and Military Establishments, 84th Cong. 2d Sess. Pages 6809-6810):

> *Colonel Rogers.* I am Col. C. A. Rogers from the Assistant Secretary of Defense's Office for Supply and Logistics.
>
> A year ago it was determined that a great percentage of petroleum, primarily aviation gasoline and jet fuel, are located in highly vulnerable areas, here in the United States. We have attempted to try to achieve a program of dispersing that storage so that it will be outside of these vulnerable areas and, therefore, will be available to us in the event of an emergency.
>
> These fuel stocks, of course, are intended for the important missions immediately following the outbreak of hostilities, and also for immediate shipment to overseas destinations.
>
> The work which we have accomplished in the last year leads us nowhere. We find that the commercial petroleum storage industry, of course, is unwilling to

undertake a program of this sort—that is providing the military with dispersed storage facilities—outside of normal commercial areas, because they will be limited under present law to a 1-year contract and, therefore, it would be exorbitant for us to try to enter into a mere 1-year contract to achieve our own objectives.

The individual 1-year cost will be exceedingly high, and we have introduced this measure in order to induce industry to go outside of their normal storage areas which are located in these highly vulnerable places, in order to build storage for us on a long-term basis and achieve the strategic protection which we feel is essential for these stocks.

* * *

The Chairman. And then the industry is providing the storage facilities of that petroleum that you buy today?

Colonel Rogers. That is correct; yes, sir.
The Chairman. That is limited to a 1-year contract?
Colonel Rogers. Yes, sir.

The Chairman. The only thing you are trying to do here is to have the permission to have a 5-year contract.

Colonel Rogers. That is correct; yes, sir.

The Chairman. You will then try to prevail on industry that with a 5-year contract they will be warranted in taking it out of a vulnerable area and putting it in an area not so vulnerable.

Colonel Rogers. That is exactly correct.

Mr. Fulling. Plus the fact that industry would engage in a program of protective construction as well as dispersing. (italics supplied)

The legislative history of Section 416 of Public Law 968 makes it abundantly clear that the commercial petroleum storage industry was unwilling to provide dispersed storage facilities outside of normal commercial areas because of the risks involved in a one-year contract with no guarantee of renewal. The solution to this problem was achieved by authorizing the military departments to enter into firm five year contracts. This feature resulted in the commercial petroleum storage industry being willing to provide the needed facilities as it then became possible to spread the investment cost over five years.

C. Negotiated contract ASP-17894.

Negotiated Contract ASP 17894 (Plaintiff's Exhibit 1) sets out the terms of the Taxpayer's contract with the Department of Defense. An analysis of this contract is vital to the Taxpayer's argument since it points up the business risks which the Taxpayer would have subjected itself to had it not utilized a five year useful life estimate for its fuel storage facility.

Section 1 of Negotiated Contract ASP 17894 sets forth the services to be furnished by the Taxpayer and the use charges to be paid by the Government during the initial five year term of the contract and during any renewal periods. The footnote to this section is important in that it indicates that the provisions dealing with payments during any of the option periods would not apply in the event the Government did not exercise one or more of its renewal options.

Section VII of the Negotiated Contract granted to the Government the option and successive options to renew its contract with the Taxpayer for three succeeding periods of five years each.

Section IX of the contract is important in that it established an option in the Government to purchase the fuel storage facility at the end of the fifth full year of the contract and at the end of each renewal period thereafter.

From the Taxpayer's standpoint, Section XII of the contract is especially significant in that it granted a right in the Government to terminate the contract for convenience. Paragraph C of Section XII, in particular, was significant from the standpoint of the taxpayer and its bankers for the reason that it set out the right of the Government to terminate its obligations under the contract, *without cost,* at the end of the fifth year of the contract, or at the end of any succeeding renewal period. The significance of this paragraph is that the Government, whether because of changed military needs or because of a change in the willingness of Congress to provide necessary funds, could have terminated its contract with the taxpayer at any time; and had it done so at the end of the first five year period, the taxpayer would have been left holding a fuel storage facility lacking any secondary or commercial use value. (1B.27) Under such circumstances, it was not surprising that the Taxpayer, as well as its bankers, insisted that the initial use charge be substantial enough to permit Taxpayer to recover its investment cost over the firm five year con-

tract period. To gamble that the contract would be renewed for one or more of the additional five year renewal periods certainly would not have been prudent or businesslike. Moreover, there was nothing in the tax laws or in Section 416 of Public Law 968 that indicated that Congress expected a contractor such as the Taxpayer to speculate on the possibility that the Government would renew its contract for any additional period, let alone for another fifteen years. Compare Section 178(a) of the Internal Revenue Code of 1954, 26 U.S.C. (1960 Ed.) Sec. 178(a) (Appendix A, Infra).

D. The Statute and Regulations.

The income tax statute involved in this case is Section 167 of the Internal Revenue Code of 1954. 26 U.S.C. (1960 Ed.) Sec. 167 (Appendix A, Infra)

Paragraph (a) of Section 167 provides that "there shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) on property used in a trade or business * * *"

Paragraph (b) of Section 167 provides that the term "reasonable allowance" shall include an allowance computed in accordance with regulations prescribed by the Secretary or his delegate, under any of several methods, including the declining balance method, using a rate not exceeding twice the straight line method.

Paragraph (c) of Section 167 limits the use of the declining balance method to property with a useful life of three years or more "the construction, reconstruction or erection which is completed after December 31, 1953" and paragraph (g) of Section 167 provides that the basis on which depreciation on obsolescence is to be allowed is the adjusted basis of the property provided in Section 1011.

The Income tax Regulations involved are Treasury Regulation 1.167(a)-1(a), 1.167(a)-1(b), 1.167(a)-9, 1.167 (a)-10(a) and 1.167(b)-0(a). (26 C.F.R. Sec. 1.167). The pertinent portions of these regulations are as follows:

> §1.167(a)-1. Depreciation in general.
>
> (a) *Reasonable allowance.* Section 167(a) provides that a reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business or of property held by the taxpayer for the production of income shall be allowed as a depreciation deduction. The allowance is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), so that the aggregate of the amounts set aside, plus the salvage value, will, at the end of the estimated useful life of the depreciable property, equal the cost or other basis of the property as provided in section 167(g) and § 1.167(g)-1. An asset shall not be depreciated below a reasonable salvage value under any method of computing depreciation. However, see section (167(f) and § 1.167(f)-1 for rules which permit reductions in the amount of salvage value to be taken into account for certain personal property acquired after October 16, 1962. See also paragraph (c) of this section for definition of salvage. The allowance shall not reflect amounts representing

a mere reduction in market value. See section 179 and § 1.179-1 for a further description of the term "reasonable allowance."

(b) *Useful life.* For the purpose of section 167 the estimated useful life of an asset is not necessarily the useful life inherent in the asset but is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business or in the production of his income. This period shall be determined by reference to his experience with similar property taking into account present conditions and probable future developments. Some of the factors to be considered in determining this period are (1) wear and tear and decay or decline from natural causes, (2) the normal progress of the act, economic changes, inventions and current developments within the industry and the taxpayer's trade or business, (3) the climatic and other local conditions peculiar to the taxpayer's policy as to repairs, renewals, and replacements. Salvage value is not a factor for the purpose of determining useful life. If the taxpayer's experience is inadequate, the general experience in the industry may be used until such time as the taxpayer's own experience forms an adequate basis for making the determination. The estimated remaining useful life may be subject to modification by reason of conditions known to exist at the end of the taxable year and shall be redetermined when necessary regardless of the method of computing depreciation. However, estimated remaining useful life shall be redetermined only when the change in the useful life is significant and there is a clear and convincing basis for the redetermination. For rules covering agreements with respect to useful life, see section 167(d) and § 1.167(d)-1.

§ 1.167(a)-9. Obsolescence.

The depreciation allowance includes an allowance

for normal obsolescence which should be taken into account to the extent that the expected useful life of property will be shortened by reason thereof. Obsolescence may render an asset economically useless to the taxpayer regardless of its physical condition. Obsolescence is attributable to many causes, including technological improvements and reasonably foreseeable economic changes. Among these causes are normal progress of the arts and sciences supersession or inadequacy brought about by developments in the industry, products, methods, markets, sources of supply, and other like changes, and legislative or regulatory action. In any case in which the taxpayer shows that the estimated useful life previously used should be shortened by reason of obsolescence greater than had been assumed in computing such estimated useful life, a change to a new and shorter estimated useful life computed in accordance with such showing will be permitted. No such change will be permitted merely because in the unsupported opinion of the taxpayer the property may become obsolete at some later date. For rules governing the allowance of a loss when the usefulness of depreciable property is suddenly terminated, see § 1.167(a)-8. If the estimated useful life and the depreciation rates have been the subject of a previous agreement, see section 167(d) and § 1.167(d)-1.

§ 1.167(a)-10. When depreciation deduction is allowable.

(a) A taxpayer should deduct the proper depreciation allowance each year and may not increase his depreciation allowances in later years by reason of his failure to deduct any depreciation allowance or of his action in deducting an allowance plainly inadequate under the known facts in prior years. The inadequacy of the depreciation allowance for property in prior years shall be determined on the basis of the allowable method of depreciation used by the taxpayer for

such property or under the straight line method if no allowance has even been claimed for such property. The preceding sentence shall not be construed as precluding application of any method provided in section 167(b) if taxpayer's failure to claim any allowance for depreciation was due solely to erroneously treating as a deductible expense an item properly chargeable to capital account. For rules relating to adjustments to basis, see section 1016 and the regulations thereunder.

§ 1.167(b)-0. Methods of computing depreciation.

(a) *In general.* Any reasonable and consistently applied method of computing depreciation may be used or continued in use under section 167. Regardless of the method used in computing depreciation, deductions for depreciation shall not exceed such amounts as may be necessary to recover the unrecovered cost or other basis less salvage during the remaining useful life of the property. The reasonableness of any claim for depreciation shall be determined upon the basis of conditions known to exist at the end of the period for which the return is made. It is the responsibility of the taxpayer to establish the reasonableness of the deduction for depreciation claimed. Generally, depreciation deductions so claimed will be changed only where there is a clear and convincing basis for a change.

E. The relevant Treasury Regulations, as applied to the present case, require that the reasonableness of any claim for depreciation, including the estimate of useful life pertinent thereto, be determined upon the basis of facts known to exist at the end of the calendar year 1960.

Treasury Regulation 1.167(b)-0(a) specifically states that "the reasonableness of any claim for depreciation shall be determined upon the basis of conditions known to

exist at the end of the period for which the return is made." The Courts have upheld the validity of this interpretation of the Statute and have similarly considered a "reasonable allowance" under Section 167 to mean one based on the expected useful life of the depreciable assets in the light of facts known or reasonably ascertainable at the end of the current taxable year. *Leonard Refineries, Inc.*, 11 T.C. 1000 at 1006 (1948); *Lake Charles Naval Stores,* 25 B.T.A. 173, at 178-179 (1932); *Commissioner v. Mutual Fertilizer Co.*, 159 F.2d 470 (C.A.5, 1947) and *Commissioner v. Cleveland Adolph Mayor Realty Corporation,* 160 F.2d 1012 (C.A.6, 1947).

In this regard, it should be noted that this particular regulation has appeared in essentially its present form since 1922. (See Reg. 62, Article 165, 1922 edition). This fact is significant for the Supreme Court has held that "Treasury Regulations and interpretations long continued without substantial change applying to unamended or substantially re-enacted statutes, are deemed to have received congressional approval and have the effect of law." *Halvering v. Winmill,* 305 U.S. 79, 59 S.Ct. 45 (1938). Moreover, the Court of Appeals for the Ninth Circuit has held that Treasury Regulations are binding on the Commissioner and Taxpayer alike. *Pacific National Bank v. Commissioner,* 91 F.2d 103. (C.A. 9, 1937).

F. Cases involving Military facilities

There have been a number of cases in which the Courts have been called upon to determine the useful life of mili-

tary related facilities. For example, it is interesting to note that the well known tax case, *Cohn v. United States*, 259 F.2d 371 (C.A. 6, 1958) involved facts quite similar to those in the instant case.

In the *Cohn* case, the taxpayer had established flying schools during World War II under separate contracts with the Government. The terms of these contracts were for one year or from the beginning of the school until the following June 30, whichever was the shorter, and were cancellable without cause on 30 days notice. While no assurance of renewals or extensions was made, the taxpayer expected the contracts to last from 2 to 4 years and established the useful life of its depreciable assets on that basis but made no allowance for salvage value.

During the latter part of 1944, the various contracts were terminated and the depreciable assets sold. The sales price in each instance was an amount in excess of the adjusted basis of the depreciable assets as at the beginning of the year of the sale. The Commissioner of Internal Revenue contended that the various items of property had useful lives of from five to ten years. The District Court held, however, and the Court of Appeals affirmed, that the taxpayer's estimate of useful life had been reasonable.

The Tax Court Memorandum Decision, *John Paul Riddell*, 12 T.C.M. 44, (1953) involves an even more comparable situation. In that case the taxpayer partnership, in 1941, organized a pilot training school and entered into

contracts with the British government to train students of the Royal Air Force. Pursuant to such contracts, substantial improvements were made to an air field located in a remote area. Following completion of the air field and after some 14 months of operation, the property was sold to the United States Government although the partnership continued to operate the air field under a lease for another 30 months. According to the Tax Court's Finding of Fact the useful life of the permanent installations at the air field would ordinarily be more than two years. However, the taxpayer partnership reasonably thought that flight training would not last more than two years and on that basis directed its auditor to depreciate the cost of the air field over the 24 month period. The term was chosen in preference to the five year emergency amortization term which the taxpayer partnership might have elected under Section 124 of the Internal Revenue Code of 1939. 26 U.S.C. (1944 ed.) Sec. 124, the predecessor to Section 168 of the Internal Revenue Code of 1954, 26 U.S.C. (1960 ed.) Sec. 168. (See Appendix A, Infra). The Commissioner, on the other hand, determined that a 60 month term should be utilized.

The Tax Court treated the issue as one of fact. It found that the useful economic life of the training field was tied in with a period of hostilities, and that the field would have no use at the end of that period. Based on this Finding, it held that there was sufficient evidence to support a determination that the two year estimate for depreciation had been proper.

A third case, *Fribourg Navigation Co., Inc. v. Commissioner,* 383 U.S. 272, 86 Sup. Ct. 682 (1966) although it involves a somewhat different issue, is significant for the light it throws upon the concept of depreciation and for the manner in which it rejects the use of hindsight evidence to disrupt reasonably arrived at estimates of useful life and salvage value.

In *Fribourg,* the taxpayer purchased a large ship in December, 1955, for $469,000 after having acquired an Internal Revenue Service private letter ruling which stated that the Service would accept (1) straight line depreciation of the ship over a useful life of three years, and (2) a $54,000 salvage value.

The adjusted tax basis of the ship at the beginning of 1957 was $327,626. As a result of the Suez crisis of 1956-1957 the market value of ships rose sharply. In June of 1957 the taxpayer accepted an offer to sell the ship for an amount well in excess of its January 1, 1957 adjusted basis. The sale of $695,500 was consummated on December 21, 1957. The taxpayer claimed a deduction for depreciation up to the date of sale.

The Commissioner's disallowance of the entire year of sale depreciation deduction was sustained by the Tax Court and by the Court of Appeals for the Second Circuit. The latter court, in affirming, considered that the sale established with mathematical certainty that the entire cost of the asset had been recovered. Therefore, no injustice could

result from denying the taxpayer an allowance for depreciation in the year of sale.

The Supreme Court reversed the decision of the Court of Appeals and allowed the depreciation deduction claimed in the year of sale. It held that the Commissioner's position commingled two distinct and well established concepts of tax accounting — depreciation of an asset through wear and tear or the gradual expiration of useful life, and fluctuations in the value of that asset through changes in price levels or market values.

One of the contentions of the Commissioner in the *Fribourg* case was that Treasury Regulation 1.167(b)-0(a) required that depreciation be determined on the basis of conditions known to exist at the end of the period for which the return was made. Thus, since the taxpayer knew that the sale of the ship had "cost" it "nothing" in the year of sale, the argument ran, the depreciation deduction for such year should be disallowed. The Court rejected this reasoning stating that this argument ignored the distinction between depreciation and gain through market appreciation. It also pointed to the interplay of Section 167 and the capital gain provisions, which interplay was reflected in the Section 167 Regulations. Finally, the Supreme Court pointed to the long-continued administrative practice which had allowed depreciation in the year of sale.

Fort Lewis Dairy v. Squire (W.D. Wash., 1954) (unreported) 1954-1 U.S.T.C. 9396 (1954)) is still another

case involving military facilities. There, the District Court held that the cost of improvements made to the taxpayer's dairy on the Fort Lewis Military Reservation should be depreciated over the five year term of the taxpayer's lease rather than over a longer period, even though a new lease was granted retroactively for an additional period of five years.

And still earlier, in *United States Cartridge Co. v. United States,* 284 U.S. 511, 52 S.Ct. 243 (1932) the Supreme Court held that in the case of a World War I ammunition maker the cost of buildings erected in 1917 could be recovered (except for salvage value) over the period ending with the cessation of hostilities. See also *United States v. Wagner Electric Mfg. Co.,* 61 F.2d 204 (C.A. 8, 1932).

Lastly, mention should be made of the admonition in Section 1016 of the Internal Revenue Code, 26 U.S.C. 1960 ed.) Sec. 1016, (Appendix A. Infra), that for purposes of determining gain or loss on the sale of property, the basis of such property must be adjusted for the greater of the depreciation allowed *or* allowable in prior years. The significance of this is that had the Taxpayer in this case overestimated the useful life of its fuel storage facility it could have been faced with the contention that its basis for the property should have been reduced by the aggregate of the depreciation deductions which would have been allowed to it had it originally made a correct estimate of useful life. Under such circumstances the taxpayer did the only thing it could do to protect its financial posi-

tion and to satisfy the representations which it had made to the Government and to its bankers regarding the existence of an adequate after-tax cash flow from the government contract. This was to assume that the Government would not exercise any of its renewal options, let alone all three of these renewal options.

G. Summary

The conclusion one reaches in reading the legislative history of Section 416 of Public Law 968, *supra,* is that, prior to 1956, the Air Force had not been able to "induce" the commercial petroleum storage industry to provide fuel storage facilities in remote or dispersed areas because of the risks involved in making such a large investment in plant and equipment with only an assurance of a one-year contract, and with single year renewals at the option of the Government. Similarly, the obvious conclusion one reaches in reading Negotiated Contract ASP 17894, and in reading the testimony of the witnesses appearing at the trial of the instant case, is that the Taxpayer was "induced" into constructing its fuel storage facility at Grand Forks, North Dakota, on the basis that it would be permitted to recover its investment in the property during the firm five-year contract. In other words, the purpose of Section 416 of Public Law 968 was to remove or reduce the risk of loss to the commercial petroleum industry in building a single purpose fuel storage facility in a non-commercial area. And just as there was the danger under the prior law that the Government would not renew its contract a sufficient

number of years to permit a facility owner to recover back its initial investment, so here there was the danger that the Government would not renew its five-year contract a sufficient number of times to permit the taxpayer to recover back its initial investment. Consequently, taxpayer, like other petroleum storage contractors, had to be able to justify entering into the contract on the basis of being guaranteed a return of its capital investment during the initial five year period since, unlike the ownership of fuel storage facilities in commercial storage areas, there would be no secondary use for the facility in the event of the failure on the part of the Government to exercise one or more of its renewal options.

Assuming then that the District Court had limited its examination of the facts to those which were either known or reasonably ascertainable at December 31, 1960, it would have recognized that the United States was not then at war (Compare 2R-263), and it would not have taken into consideration the fact that the Government had, begrudgingly exercised its option to renew its contract with the Taxpayer for the first of its three successive five year renewal periods. Assuming, likewise, that the District Court had limited its examination of the facts to those which were either known or ascertainable at December 31, 1960, it would not have accepted the word of Col. Morfield that the Grand Forks Air Force Base would be utilized for the full 20 years (2R.263) as Col. Morfield was not even assigned to the Air Force Fuel Petroleum Supply Office

until August of 1964 (2R.230) which was some three and one-half years after the date the estimate of useful life was required to be made.

Instead of the abovementioned facts, the District Court should have asked itself whether, based upon the legislative history of Section 416 of Public Law 968, the indecisiveness of the Air Force as to its fuel storage requirements at Grand Forks, North Dakota, the termination for convenience provisions of Negotiated Contract ASP 17894 and the stipulated fact that there would be no commercial use for the fuel storage facility at the end of the Government contract, it was "more probable" than not that the Government would renew its contract with the Taxpayer, and, if so, whether it was more probable than not that the contract would be renewed for an additional period of five years, an additional period of ten years, or an additional period of fifteen years. Compare *Pasadena City Lines, Inc.*, 23 T.C. 34, at 38 (1954) and *Bonwit Teller and Co. v. Commissioner*, 53 F.2d 531 (C.A. 2, 1931) with Section 178 of the Internal Revenue Code of 1954, (Appendix A, Infra). The District Court Failed to ask itself this question and its failure to do so constituted reversable error.

2. The District Court erred in holding that it was permissible to use hindsight evidence in determining the useful life of taxpayer's fuel storage facility.

A. The District Court's Reasoning.

The facts adduced at the hearing in this case establish that the Taxpayer did not know at the end of either 1959

or 1960, nor could it have known at those times, that the Government would renew the fuel storage contract for an additional five year period. These facts also establish that it is still too early to know whether or not the Government will renew its contract for one or both of the two remaining five-year renewal periods. Notwithstanding these facts, the District Court held that on the basis of hindsight evidence, i.e. the one renewal of the contract, the continued existence of the cold war, and the testimony of Col. Morfield that he was of the opinion that the Air Force would continue to use the Grand Forks Air Base during the remaining two five year option periods, a useful life estimate of twenty years should have been utilized by the Taxpayer in determining allowable depreciation for the year 1960.

Counsel for the Plaintiff objected to the admission of hindsight evidence at the trial (2R.35) but its objection was overruled (2R.248).

That the use of hindsight evidence was the factor that weighed heaviest in the mind of the District Court is evidenced by the following statement by the Court:

> "Then, of course, there the Plaintiff's estimate of the length of actual contract was five years and in calculating their needs, financial needs, they used that figure as their method of depreciating this facility so that they would have sufficient cash flow to pay all of their obligations, including taxes, to pay off the financing arrangements.
>
> However that estimate they made would have to be the basis for my decision in favor of the taxpayer and

that alone; just the fact that they estimated it at that, because there isn't any other facet here that I have heard, upon which to decide in favor of the taxpayer. *It is just that they thought it would only go 5 years and they had some good reasons for feeling that way, I am sure, however it didn't run out that way, so that estimate on their part appears to be in error.* So that when you talk about sustaining the burden of proof in this case, that means to the court the more convincing power of the evidence and I can't be convinced that that estimate as contrasted to the bid itself, and the hindsight, the fact that it just didn't turn out that way, and the facility is still in use, and it appears from the testimony of Col. Morfield that it is going to be in use, I think, at least balances the scale, in fact tips them in favor of the defendant, the government here so that on the basis of the testimony I would find as a matter of fact that the Plaintiff has failed to sustain the burden and I would have to decide therefore in favor of the government that the plaintiff was not entitled to depreciate this facility on this formula that they used which was a five year useful life basis." (2R.259-261)

* * *

Well, I said 20 years, strictly on the basis of what Col. Morsfield said, plus the fact that I have to take judicial knowledge of that fact that we are at war." (2R.263)

* * *

One other thing, if I do decide this as I have indicated, and I don't change my mind in accordance with your argument, in the decision I am going to put it as they should say on the street "cold turkey" that I did use hindsight; so that when the Circuit sees it, which they undoubtedly will because of the magnitude of this case, which involves a lot of money, they will

know exactly what my thinking was. I will put it right in the decision." (italics supplied) (2R.248)

That Col. Morfield's testimony was based on hindsight evidence is illustrated by the fact that he first became associated with the Air Force Petroleum Supply Office in August of 1964. (2R.230) That date was more than three years after the close of the taxable year in question. Instead of being harmful, Col. Morfield's testimony is helpful to the Taxpayer's argument since he admits that the Air Force method of projecting future fuel storage requirements did not extend beyond five years (2R.232). This fact is implicit in the underlying contract itself which permits termination without cost to the Government at the end of the first five year period and at the end of each five year period thereafter. It is also implicit in the testimony of Frances J. DeFavio to the effect that the Government's own estimate of its storage requirements did not exceed five years, and in the instant case were reduced to three years and to 208,000 barrels of capacity at the time of the first renewal of taxpayer's fuel storage contract. (2R.139,169)

Based on these facts and on the further fact that none of the questions which were asked of the witnesses Col. Morefield and Frances J. DeFavio, Jr. were premises on conditions known to exist at December 31, 1960, it is obvious that their testimony was based wholly on hindsight evidence and on their present estimate of what the future defense needs of the United States might be. Certainly, something more than this type of evidence is required as proof of facts existing at the end of the year 1960.

B. The Mutual Fertilizer Company Case

As indicated earlier in this brief, Treas. Reg. 1.167(b)-0(a) requires that "the reasonableness of any claim for depreciation shall be determined upon the basis of conditions known to exist at the end of the period for which the return is made." The impact of this regulation, insofar as it had application here, is best illustrated by the decision of the Court of Appeals of the Fifth Circuit in the case *Commissioner of Internal Revenue v. Mutual Fertilizer Company*, supra. In that case the taxpayer, in its tax returns for the years 1921 through 1923 and 1927 through 1933, did not claim and was not allowed depreciation on its plant. For the years 1924 through 1926, it claimed and was allowed depreciation on the basis of an estimated useful life of its plant of from 5 to 7 years, from June 1, 1920. For 1934 and 1935 the Commissioner determined a 20 year useful life for the plant dating from June 1, 1920. The taxpayer acquiesced in this adjustment. For the years 1939 to 1941, however, the Commissioner determined that the useful life of the plant would extend to June 1, 1953, and the taxpayer conceded that this was correct. In determining the adjusted basis for depreciation in the taxable years 1939 to 1941 a controversy arose over the method of determining the amounts "allowable" for those ten years in which no depreciation had been claimed and none was in fact "allowed". In disposing of this issue, the Tax Court stated:

> "The case is one in which a 20 year useful life was mistakenly applied in 1934 and it now appears that

> the proper life span was at all times 33 years. Under the circumstances we think it must be held that depreciation allowed for the years in question should be computed upon the longer useful life." *Mutual Fertilizer Company v. Commissioner,* 5 T.C. 1122, at 1125 (1945).

The Court of Appeals, in reversing, made specific reference to the earlier quoted income tax regulation and stated:

> "The error of the Tax Court lies in its majority's view that it "now appears" years after the end of the periods for which "allowable" amounts must be determined, that 33 years is and was the forseeable useful life of the plant assets. *The critical factor is not what "now appears" but what "then appeared" to be the useful life of the plant. That is, what reasonably was known and ascertainable at the end of each of such periods as to the reasonably forseeable useful life of the plant."* (italics supplied) *Mutual Fertilizer Company v. Commissioner, supra, at 472.*

Accordingly, since the Commissioner had determined that at the end of the prior periods the reasonably forseeable useful life of the plant had been 20 years from June 1, 1920, it was held that the Commissioner's determination must stand in the absence of proof that it was wrong.

C. Other cases rejecting the use of Hindsight Evidence

There have been a number of other cases where courts have held that it was not proper to consider hindsight evidence in determining the rate of depreciation or the useful life of depreciable assets. For example, in *Commissioner*

v. Cleveland Adolph Mayor Corporation, supra, the Court of Appeals for the Sixth Circuit reversed still another decision of the Tax Court which had held that "allowable" depreciation in respect of a building should be based upon facts learned years after the original estimate of useful life had been made. In applying the language of Treas. Reg. 1.167(b)-0(a) to the facts of that case, the Court of Appeals concluded that the Tax Court had committed error in utilizing hindsight evidence to determine the amount of depreciation which was allowable in three earlier years. What is interesting is that the Court of Appeals, in support of its decision, referred to the 1932 amendment to Section 113(b) (1) (b) of the Revenue Act of 1932 and to the report of the Senate Finance Committee, S. Rept. 665. 72nd Congress, 1st sess., 29, which read as follows:

> "Your Committee has not thought it necessary to include any express provision against retroactive adjustments of depreciation on the part of the treasury as the regulations of the treasury seem adequate to protect the interest of the taxpayers in such cases. *These regulations require the depreciation allowances to be made from year to year in accordance with the then known facts, and to not permit a retroactive change in these allowances by reason of the facts developed or ascertained after the years by which such allowances are made."* (italics supplied)

The decision of the Circuit Court was that facts subsequently developed should be reflected in the allowances for subsequent years, but that they should have no retroactive force or effect. *Alpin J. Cameron, et al.* 8 B.T.A. 120 (1927); *Fireman's Insurance Co.*, 30 B.T.A. 1004, 1011

(1934); *Wilkins, Important Developments in Deductability of Repairs; Depreciation; Depletion allowances,* 6 New York University Institute of Taxation, 637, 642-654 (1948).

D. Summary

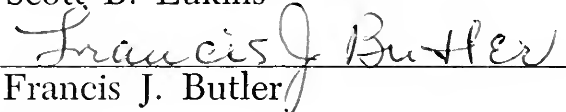
The Income Tax Regulations require a taxpayer in estimating the useful life of a depreciable asset to apply his experience with similar property and to take into consideration the then existing conditions and "probable" future developments. The officers of the Taxpayer followed this procedure in determining, at the end of 1959, and once again at the end of 1960, that it was not "probable" that the Government would exercise its option to renew its fuel storage contract for one or more of the three five-year renewal periods. And the District Court admitted "they had some good reasons for feeling that way" (2R.260). Under those circumstances the estimate which was made by the Taxpayer-Appellant should not be upset, even if subsequent events prove it to be partially erroneous. *Kennecott Copper Corp. v. United States,* 347 F.2d 275 at 285 (Ct. Claims. 1965).

CONCLUSION

The Judgment of the District Court should be reversed and the case remanded for entry of Judgment for the Plaintiff. In the alternative, the Judgment of the District Court should be reversed and the case remanded for the purpose of determining whether, based on the facts known to the Plaintiff at the close of 1960, it was more probable than not that the Government would renew Negotiated Contract ASP 17894 with the Taxpayer and, if so, whether it was more probable than not that it would be renewed for an additional five years, for an additional ten years, or for an additional fifteen years.

Respectfully submitted,

Scott B. Lukins



Francis J. Butler

BUTLER & LUKINS

725 Lincoln Building
Spokane, Washington 99201

CERTIFICATE

I certify that, in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DATED this 4th day of March, 1968.

Scott B. Lukins

APPENDIX "A"

Internal Revenue Code of 1954

SEC. 167. DEPRECIATION.

[Sec. 167(a)]

(a) *General Rule.* There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

Source: Sec. 23(l) (1), 1939 Code.

[Sec. 167(b)]

(b) *Use of Certain Methods and Rates.* For taxable years ending after December 31, 1953, the term "reasonable allowance" as used in subsection (a) shall include (but shall not be limited to) an allowance computed in accordance with regulations prescribed by the Secretary or his delegate, under any of the following methods:

(1) the straight line method,

(2) the declining balance method, using a rate not exceeding twice the rate which would have been used had the annual allowance been computed under the method described in paragraph (1).

(3) the sum of the years-digits method, and

(4) any other consistent method productive of an annual allowance which, when added to all allowances for the period commencing with the taxpayer's use of

the property and including the taxable year, does not, during the first two-thirds of the useful life of the property, exceed the total of such allowances which would have been used had such allowances been computed under the method described in paragraph (2).

Nothing in this subsection shall be construed to limit or reduce an allowance otherwise allowable under subsection (a).

Source: New.

[Sec. 167(c)]

(c) *Limitations on Use of Certain Methods and Rates.* Paragraphs (2), (3), and (4) of subsection (b) shall apply only in the case of property (other than intangible property) described in subsection (a) with a useful life of 3 years or more—

(1) the construction, reconstruction, or erection of which is completed after December 31, 1953, and then only to that portion of the basis which is properly attributable to such construction, reconstruction, or erection after December 31, 1953, or

(2) acquired after December 31, 1953, if the original use of such property commences with the taxpayer and commences after such date.

Source: New.

* * *

[Sec. 167(g)]

(g) *Basis for Depreciation.* The basis on which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 1011 for the purpose of determining

the gain on the sale or other disposition of such property. Source: Secs. 23(n), 114(a), 1939 Code.

(26 U.S.C., 1960 ed., Sec. 167)

SEC. 168. AMORTIZATION OF EMERGENCY FACILITIES.

[Sec. 168(a)]

(a) *General Rule.* Every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis (for determining gain) of any emergency facility (as defined in subsection (d)), based on a period of 60 months. Such amortization deduction shall be an amount, with respect to each month of such period within the taxable year, equal to the adjusted basis of the facility at the end of such month divided by the number of months (including the month for which the deduction is computed) remaining in the period. Such adjusted basis at the end of the month shall be computed without regard to the amortization deduction for such month. The amortization deduction above provided with respect to any month shall, except to the extent provided in subsection (f), be in lieu of the depreciation deduction with respect to such facility for such month provided by section 167. The 60-month period shall begin as to any emergency facility, at the election of the taxpayer, with the month following the month in which the facility was completed or acquired, or with the succeeding taxable year.

(26 U.S.C., 1960 ed., Sec. 168)

SEC. 178. DEPRECIATION OR AMORTIZATION OF IMPROVEMENTS MADE BY LESSEE ON LESSOR'S PROPERTY.

[Sec. 178(a)]

(a) *General Rule.* Except as provided in subsection (b), in determining the amount allowable to a lessee as a

deduction for any taxable year for exhaustion, wear and tear, obsolescence, or amortization—

(1) in respect of any building erected (or other improvement made) on the leased property, if the portion of the term of the lease (excluding any period for which the lease may subsequently be renewed, extended, or continued pursuant to an option exercisable by the lessee) remaining upon the completion of such building or other improvement is less than 60 percent of the useful life of such building or other improvement, or

(2) in respect of any cost of acquiring the lease, if less than 75 percent of such cost is attributable to the portion of the term of the lease (excluding any period for which the lease may subsequently be renewed, extended, or continued pursuant to an option exercisable by the lessee) remaining on the date of its acquisition,

the term of the lease shall be treated as including any period for which the lease may be renewed, extended, or continued pursuant to an option exercisable by the lessee, unless the lessee establishes that (as of the close of the taxable year) it is more probable that the lease will not be renewed, extended, or continued for such period than that the lease will be so renewed, extended, or continued.

(26 U.S.C. 1960 ed., Sec. 178)

SEC. 1016. ADJUSTMENTS TO BASIS.

[Sec. 1016(a)]

(a) *General Rule.* Proper adjustment in respect of the property shall in all cases be made—

* * *

(2) in respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent of the amount—

(A) allowed as deductions in computing taxable income under this subtitle or prior income tax laws, and

(B) resulting (by reason of the deductions so allowed) in a reduction for any taxable year of the taxpayer's taxes under this subtitle (other than chapter 2, relating to tax on self-employment income), or prior income, war-profits, or excess-profits tax laws,

but not less than the amount allowable under this subtitle or prior income tax laws. Where no method has been adopted under section 167 (relating to depreciation deduction), the amount allowable shall be determined under section 167 (b) (1). * * *

(26 U.S.C. 1960 ed., Sec. 1016 (a)

Treasury Regulations on Income Tax (1954 Code)

§ 1.167(a)-1. Depreciation in general.

(a) *Reasonable allowance.* Section 167(a) provides that a reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business of property held by the taxpayer for the production of income shall be allowed as a depreciation deduction. The allowance is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), so that the aggregate of the amounts set aside, plus the salvage value, will, at the end of the estimated useful life of the depreciable property, equal the cost or other basis of the property as provided in section 167(g) and § 1.167(g)-1. An asset shall not be depreciated below a reasonable salvage value under any method of computing depreciation. However, see section 167(f) and § 1.167(f)-1 for rules which permit reduction in the amount of salvage value to be taken into account for certain personal property acquired after October 16, 1962. See also paragraph (c) of this section for definition of salvage. The allowance shall not reflect amounts represent-

ing a mere reduction in market value. See section 179 and § 1.179-1 for a further description of the term "reasonable allowance."

(b) *Useful life.* For the purpose of section 167 the estimated useful life of an asset is not necessarily the useful life inherent in the asset but is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business or in the production of his income. This period shall be determined by reference to his experience with similar property taking into account present conditions and probable future developments. Some of the factors to be considered in determining this period are (1) wear and tear and decay or decline from natural causes, (2) the normal progress of the art, economic changes, inventions and current developments within the industry and the taxpayer's trade or business, (3) the climatic and other local conditions peculiar to the taxpayer's trade or business, and (4) the taxpayer's policy as to repairs, renewals, and replacements. Salvage value is not a factor for the purpose of determining useful life. If the taxpayer's experience is inadequate, the general experience in the industry may be used until such time as the taxpayer's own experience forms an adequate basis for making the determination. The estimated remaining useful life may be subject to modification by reason of conditions known to exist at the end of the taxable year and shall be redetermined when necessary regardless of the method of computing depreciation. However, estimated remaining useful life shall be redetermined only when the change in the useful life is significant and there is a clear and convincing basis for the redetermination. For rules covering agreements with respect to useful life, see section 167(d) and § 1.167(d)-1.

(26 C.F.B., Sec. 1.167 (a)-1)

§ 1.167(a)-9. Obsolescence.

The depreciation allowance includes an allowance for

normal obsolescence which should be taken into account to the extent that the expected useful life of property will be shortened by reason thereof. Obsolescence may render an asset economically useless to the taxpayer regardless of its physical condition. Obsolescence is attributable to many causes, including technological improvements and reasonably foreseeable economic changes. Among these causes are normal progress of the arts and sciences, supersession or inadequacy brought about by developments in the industry, products, methods, markets, sources of supply, and other like changes, and legislative or regulatory action. In any case in which the taxpayer shows that the estimated useful life previously used should be shortened by reason of obsolescence greater than had been assumed in computing such estimated useful life, a change to a new and shorter estimated useful life computed in accordance with such showing will be permitted. No such change will be permitted merely because in the unsupported opinion of the taxpayer the property may become obsolete at some later date. For rules governing the allowance of a loss when the usefulness of depreciable property is suddenly terminated, see § 1.167(a)-8. If the estimated useful life and the depreciation rates have been the subject of a previous agreement, see section 167(d) and § 1.167(d)-1. [Reg. 1.167(a)-9.]

(26 C.F.B. Sec. 1.167(a)-9)

§ 1.167(a)-10. When depreciation deduction is allowable.

(a) A taxpayer should deduct the proper depreciation allowance each year and may not increase his depreciation allowances in later years by reason of his failure to deduct any depreciation allowance or of his action in deducting an allowance plainly inadequate under the known facts in prior years. The inadequacy of the depreciation allowance for property in prior years shall be determined on the basis of the allowable method of depreciation used by the taxpayer for such property or under the straight line

method if no allowance has even been claimed for such property. The preceding sentence shall not be construed as precluding application of any method provided in section 167(b) if taxpayer's failure to claim any allowance for depreciation was due solely to erroneously treating as a deductible expense an item properly chargeable to capital account. For rules relating to adjustments to basis, see section 1016 and the regulations thereunder.

(b) The period for depreciation of an asset shall begin when the asset is placed in service and shall end when the asset is retired from service. A proportionate part of one year's depreciation is allowable for that part of the first and last year during which the asset was in service. However, in the case of a multiple asset account, the amount of depreciation may be determined by using what is commonly described as an "averaging convention", that is, by using an assumed timing of additions and retirements. For example, it might be assumed that all additions and retirements to the asset account occur uniformly throughout the taxable year, in which case depreciation is computed on the average of the beginning and ending balances of the asset account for the taxable year. See example (3) under paragraph (b) of § 1.167(b)-1. Among still other averaging conventions which may be used is the one under which it is assumed that all additions and retirements during the first half of a given year were made on the first day of that year and that all additions and retirements during the second half of the year were made on the first day of the following year. Thus, a full year's depreciation would be taken on additions in the first half of the year and no depreciation would be taken on additions in the second half. Moreover, under this convention, no depreciation would be taken on retirements in the first half of the year and a full year's depreciation would be taken on the retirements in the second half. An averaging convention, if used, must be consistently followed as to the account or accounts for which it is adopted, and must be applied to both additions and retirements. In any year in which an averaging convention substantially distorts the depreciation allowance

for the taxable year, it may not be used. [Reg. § 1.167(a)-10.]

(26 C.F.B., Sec. 1.167(a) Sec. 1.167(a)-10)

§ 1.167(b)-0. Methods of computing depreciation.

(a) *In general.* Any reasonable and consistently applied method of computing depreciation may be used or continued in use under section 167. Regardless of the method used in computing depreciation, deductions for depreciation shall not exceed such amounts as may be necessary to recover the unrecovered cost of other basis less salvage during the remaining useful life of the property. The reasonableness of any claim for depreciation shall be determined upon the basis of conditions known to exist at the end of the period for which the return is made. It is the responsibility of the taxpayer to establish the reasonableness of the deduction for depreciation claimed. Generally, depreciation deductions so claimed will be changed only where there is a clear and convincing basis for a change.

(b) *Certain methods.* Methods previously found adequate to produce a reasonable allowance under the Internal Revenue Code of 1939 or prior revenue laws will, if used consistently by the taxpayer, continue to be acceptable under section 167(a). Examples of such methods which continue to be acceptable are the straight line method, the declining balance method with the rate limited to 150 percent of the applicable straight line rate, and under appropriate circumstances, the unit of production method. The methods described in section 167(b) and §§ 1.167(b)-1, 1.167(b)-2, 1.167(b)-3, and 1.167(b)-4 shall be deemed to produce a reasonable allowance for depreciation except as limited under section 167(c) and § 1.167(c)-1. See also § 1.167(e)-1 for rules relating to change in method of computing depreciation.

(c) *Application of methods.* In the case of item accounts, any method which results in a reasonable allow-

ance for depreciation may be selected for each item of property, but such method must thereafter be applied consistently to that particular item. In the case of group, classified or composite accounts, any method may be selected for each account. Such method must be applied to that particular account consistently thereafter but need not necessarily be applied to acquisitions of similar property in the same or subsequent years, provided such acquisitions are set up in separate accounts. See, however, § 1.167

(e)-1 and section 446 and the regulations thereunder, for rules relating to changes in the method of computing depreciation, and § 1.167(c)-1 for restriction on the use of certain methods. See also § 1.167(a)-7 for definition of account. [Reg. § 1.167(b)-0.]

(26 C.F.B Sec. 1.167(b)-0)

APPENDIX "B"

TABLE OF EXHIBITS PURSUANT TO RULE 18(2)F AS AMENDED:

Plaintiff's Exhibits 1 through 10 and 12 and Defendant's Exhibits 101-110 were identified and admitted in evidence as set forth in the Transcript of Proceedings.

No. 22,387

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN TERMINAL COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the Judgment of the United States District Court for the Eastern District of Washington

BRIEF FOR THE APPELLEE

MITCHELL ROGOVIN
Assistant Attorney General.

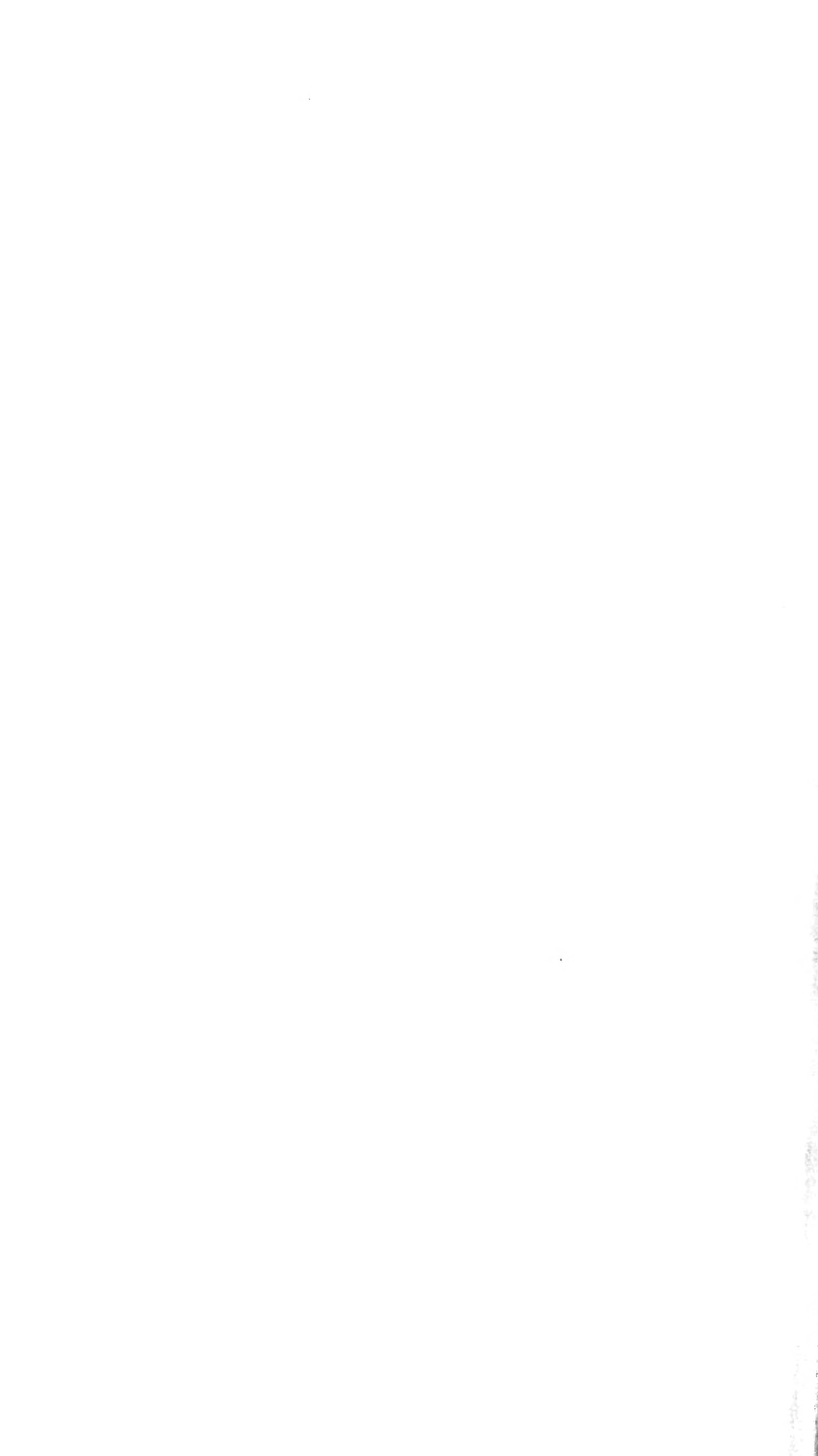
LEE A. JACKSON,
WILLIAM FRIEDLANDER,
JEANINE JACOBS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:
SMITHMOORE P. MYERS,
United States Attorney.

FILED

MAY

LAWTON PRINTING, INC., 5-3-68—50 COPIES



INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and Regulations involved	2
Statement	2
Summary of argument	7
Argument:	
The District Court correctly held that taxpayer was entitled to a depreciation deduction for its fuel storage facilities based on a twenty-year useful life as contended by the Government, rather than on a five-year useful life as contended by the taxpayer	10
Conclusion	26
Appendix	29

CITATIONS

Page

Cases:

Bullock v. *Commissioner,* 26 T.C. 276, affirmed *per curiam,* 253 F. 2d 715 .... 15, 16

Detroit Edison Co. v. *Commissioner,* 319 U.S. 98 13

Dunn v. *Commissioner,* 42 T.C. 490 15

Gordon Lubricating Co. v. *Commissioner,* decided May 18, 1965, 24 T.C.M. 697 .... 15, 16

Helvering v. *Gowran,* 302 U.S. 238, rehearing denied, 302 U.S. 781 26

Lassen Lumber & Box Co. v. *Blair,* 27 F. 2d 17 .... 15, 16, 19, 20, 26

Massey Motors v. *United States,* 364 U.S. 92 .... 12, 13, 19

Richmond Television Corp. v. *United States,* 354 F. 2d 410 .... 15, 16, 18

United States v. *Ludey,* 274 U.S. 295 19

Virginian Hotel Co. v. *Helvering,* 319 U.S. 523.. 13

Westinghouse Broadcasting Co. v. *Commissioner,* 309 F. 2d 279, certiorari denied, 372 U.S. 935 .... 15, 18

CITATIONS (Continued)

Page

Statutes:

Act of August 3, 1956, P.L. 968, 70 Stat. 991, Sec. 416 ---------------------------------- 18

Internal Revenue Code of 1954, Sec. 167 (26 U.S.C. 1964 ed., Sec. 167) --5, 7, 10, 11, 29

10 U.S.C., Sec. 2388 ---------------------------- 18

Miscellaneous:

H. Rep. No. 1337, 83d Cong., 2d Sess., p. 22 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4046-4047) ---------------------------- 12

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.167(a)-1 (26 C.F.R., Sec. 1.167(a)-1) -------------------- 12, 19, 30

Sec. 1.167(b)-0 (26 C.F.R., Sec. 1.167(b)-0) ---------------------- 14, 19

Sec. 1.167(b)-2 (26 C.F.R., Sec. 1.167(b)-2)-- 11

No. 22,387

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN TERMINAL COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the Judgment of the United States District Court for the Eastern District of Washington

---

BRIEF FOR THE APPELLEE

OPINION BELOW

The findings of fact and conclusions of law (I-R. 24-28) have not yet been officially reported.

JURISDICTION

This appeal involves federal income taxes for the year 1960. On June 3, 1964, the taxpayer paid a deficiency in its income tax for the taxable year 1960 in the amount of $203,222.05 (plus interest). (I-R. 11.)

Taxpayer filed claim for refund of this sum on January 29, 1965, which claim was denied April 2, 1965. (I-R. 11.) Within the time provided by Section 6532 of the Internal Revenue Code of 1954, on March 18, 1966, the taxpayer brought the action in the District Court for recovery of the $203,222.05 together with interest as provided by law. (I-R. 1-3.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The judgment of the District Court was entered on September 5, 1967, awarding the taxpayer the principal amount of $64,313.21. (I-R. 29.) Within 60 days thereafter, on September 26, 1967, the taxpayer filed a notice of appeal. (I-R. 30.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court clearly erred in finding, as a factual matter, that the useful life of taxpayer's fuel storage facility was 20 years (as contended by the Government) and not 5 years (as contended by the taxpayer).

STATUTE AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra.*

STATEMENT

The facts, as found by the District Court (I-R. 24-27), many of which were admitted in the pretrial conference order (I-R. 10-13), are as follows:

The taxpayer is a corporation organized and existing under the laws of the State of Washington, with its principal business address at 220 North Haven Street, Spokane, Washington. (I-R. 24.)

The taxpayer was organized on February 11, 1959, for the purpose of bidding on a contract with the United States Government, for the construction and operation of a fuel storage facility to be located adjacent to the Grand Forks North Dakota Air Base. (I-R. 24.)

On April 22, 1959, the taxpayer was awarded a contract for storing and handling Government-owned petroleum products at Grand Forks, North Dakota, which contract was modified as to size by a subsequent contract dated May 8, 1959. This contract was for a period of five years with three options to renew for additional five-year periods. (I-R. 25.) Under it, taxpayer was to construct the storage facility and to be reimbursed for the cost thereof by payments from the Government over the first five-year period.

At the end of any of the four five-year periods the Government had a right to purchase the storage facility by paying the following amounts (I-R. 25):

At the end of the fifth year	$937,500.00
At the end of the first renewal period	800,000.00
At the end of the second renewal period	600,000.00
At the end of the third renewal period	375,000.00

The contract also provided that the Government could terminate on 30 days notice by paying 30% of the unexpired use charges for the period. Upon termination the Government had the option to purchase for certain specified amounts. (I-R. 25.)

The contract, Department of Defense negotiated Contract No. A.S.P.-17894, was in the amount of $3,186,000, and was based upon the following estimates of cost, operating expenses and profit (I-R. 25):

Construction Cost	$1,875,000
Termination settlement	162,000
Operating Costs (5 years at $124,500 a year)	622,500
Interest on construction	326,625
Total estimated Costs	$2,986,125
Profit	199,875
Firm 5-year price	$3,186,000

The total price for the three five-year renewal periods totaled $1,984,500 and included estimated costs of operation and maintenance. (I-R. 25.)

Between April 27, 1959, and September 1, 1959, taxpayer constructed a storage facility near Grand Forks, North Dakota, for receiving, storing and distributing petroleum products to the Grand Forks Air Force Base, which is located some 15 miles from the site of the storage facility. (I-R. 26.)

The storage facility constituted property used in the taxpayer's trade or business of a type subject to an allowance for depreciation under the provisions of Section 167 of the Internal Revenue Code of 1954. (I-R. 26.)

The taxpayer's cost for the storage facility was as follows (I-R. 26):

Land	$ 35,935.10
Terminal facilities	794,026.66
Pipelines, off site	294,505.60
	$1,124,467.36

The cost of the depreciable assets was $1,088,532.26 (terminal facilities plus pipelines). (I-R. 26.)

Taxpayer, at all times during the year 1960, was the owner of the fuel storage facility. (I-R. 26.)

As of January 1, 1960, the depreciable assets included in taxpayer's fuel storage facility had an adjusted basis of $1,034,264.88. (I-R. 26.)

On January 13, 1961, the taxpayer sold the storage facility for $1,934,250. (I-R. 26.)

The Government exercised its option to renew its storage contract for the second five-year period which began October 1, 1964. (I-R. 26.)

The storage facility in question has a physical life of at least 20 years. (I-R. 26.)

Taxpayer made a timely election to compute the depreciation deduction to be allowed to it on the declining method using a rate twice that allowed by the straight line method. (I-R. 26.)

In computing the amount of depreciation to be allowed taxpayer for its taxable years 1959 and 1960, taxpayer estimated that said storage facility had a useful life of five years. Taxpayer made no estimate of the salvage value of the depreciable assets on its returns for those years. The Government contends that the storage facility has a useful life of 20 years. (I-R. 27.)

The storage facility will have no commercial use upon termination of use by the United States Air Force. Its only value will be as scrap value. (I-R. 27.)

The Grand Forks Air Base was completed in 1960 and the storage facility was constructed to supply the Air Base. The Grand Forks Air Base is expected to be in use for many years to come with a present projection of slightly increased use. (I-R. 27.)

In prior dealings with the Government the taxpayer had been the low bidder on the first five-year period of a similar contract for another project but had not received the contract since it was not the low bidder on the full 20-year period. On the bidding on the contract here in question the taxpayer was not the low bidder on the first five-year period but received

the contract as a result of being the low bidder on the 20-year period. In order to be the low bidder on the 20-year period the taxpayer submitted a revised bid which was substantially lower than its original bid. (I-R. 27.)

During the negotiations surrounding the renewal of the contract for the first option period the taxpayer offered to reduce the renewal price if the Government would relinquish its final two options to renew. The Government refused this offer. (I-R. 27.)

On the basis of the foregoing, the District Court concluded (I-R. 27-28):

> Using hindsight, it is clear that the five year useful life claimed by the plaintiff was unrealistic. All the testimony and evidence indicated that the storage facility would be used for at least 20 years.
>
> The storage facility had a useful life of 20 years for purposes of computing the depreciation deduction under Section 167 of the Internal Revenue Code of 1954.

SUMMARY OF ARGUMENT

The question raised by this appeal is whether the taxpayer was entitled, in the second year (1960) of use of a storage facility built in 1959 under a Government defense contract for receiving, storing and distributing petroleum products, to a depreciation deduction for his fuel storage facility based on a 20-year

useful life (as contended by the Government, and found by the District Court) or a five-year useful life (as contended by the taxpayer). The contract provided that the Government would use taxpayer's facility for storage of Government owned fuel for a term of five years with options on the part of the Government to renew the contract for three successive five-year periods at fixed option prices. It was stipulated that the storage facility in question has a physical life of at least 20 years; it is agreed that whether its useful life was 20 years, or some lesser period, depended entirely upon the portion of the 20-year option which the Government would eventually exercise. The evidence clearly established that when the contract was awarded, it was awarded on a predicted use by the Air Force of the full 20 years. Thus, bids that would have granted the Air Force more favorable terms than taxpayer's bid in the initial five-year period at the price of accepting less favorable terms over the full 20-year period were rejected in favor of taxpayer's bid.

It was the taxpayer's burden to establish by a preponderance of the evidence that the conditions known to exist at the end of 1960, the tax year in question, would reflect a reasonable certainty that the facility would be used for some specific period less than the 20-year term. This is consistent with the very basic precepts of depreciation accounting which seek to make a meaningful allocation of cost to the tax period benefited by the use of the asset.

Taxpayer wholly failed to meet this burden. He relied essentially on (1) the very fact of non-certainty itself and the conservative financing arrangements made by him in keeping with that non-certainty and (2) the uncorroborated and vague assertions that the B-52's which the facility was intended to service, would be phased out.

But, as this Court has held, the mere possibility of non-renewal does not establish with the required reasonable certainty that the contract will not run for the full 20-year period, and this will not support a foreshortened useful life. Nor does business acumen or prudence have any bearing insofar as we are concerned with estimating useful life for tax depreciation purposes. Moreover, the taxpayer's conjecture neither took account of servicing existing B-52's and/or other successor bomber aircraft, nor did it provide any basis in fact for a necessary finding that the asserted phasing out would reach such a stage at any given point within the 20-year period as to bring about discontinuance of the use of the facility.

In short, the taxpayer has failed to show a reasonable certainty of non-renewal or that there is any other basis for adopting less than the 20-year useful life used by the Commissioner and found by the District Court.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT TAXPAYER WAS ENTITLED TO A DEPRECIATION DEDUCTION FOR ITS FUEL STORAGE FACILITIES BASED ON A TWENTY-YEAR USEFUL LIFE AS CONTENDED BY THE GOVERNMENT, RATHER THAN ON A FIVE-YEAR USEFUL LIFE AS CONTENDED BY THE TAXPAYER

Section 167(a) of the Internal Revenue Code of 1954, Appendix, *infra,* allows a depreciation deduction for the exhaustion, wear and tear, including a reasonable allowance for obsolescence of property used in a trade or business.

This case deals with a storage facility built under a Government defense contract for receiving, storing and distributing petroleum products to the Grand Forks Air Force Base which is located some fifteen miles from the site of the storage facility. The contract provided that the Government would use taxpayer's facilities for storage of Government owned fuel for a term of five years with options on the part of the Government to renew the contract for three successive five-year periods at fixed option prices. (I-R. 25-26.) The

sole question raised by this appeal is the useful life of this facility for purposes of tax depreciation deduction under Section 167(a).[1] The District Court found that it is twenty years. The taxpayer, who unsuccessfully urged a five-year period at trial (II-R. 9-10), appeals.

---

[1] Any reasonable and consistently applied method of computing depreciation may be used or continued in use under Section 167 including the double declining balance method used by this taxpayer. Section 167(b)(2), Appendix, *infra*. Under the declining balance method a uniform rate is applied each year to the unrecovered cost or other basis of the property. Such rate determined under Section 167(b)(2) shall not exceed twice the appropriate straight line rate computed without adjustment for salvage. See Sec. 1.167(b)-2, Treasury Regulations on Income Tax, Appendix, *infra*.

While the governing statute has at no time defined the term "useful life" (*Massey Motors* v. *United States,* 364 U.S. 92, 97), Treasury Regulations on Income Tax (1954 Code), Section 1.167(a)-1(b), Appendix, *infra,* sets forth relevant considerations for determining that life as follows:[2]

> (b) *Useful life.* For the purpose of section 167 the estimated useful life of an asset is not necessarily the useful life inherent in the asset but is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business or in the production of his income. This period shall be determined by reference to his experience with similar property taking into account present conditions and probable future developments. Some of the factors to be considered in determining this period are (1) wear and tear and decay or decline from natural causes, (2) the normal progress of the art, economic changes, inventions, and current

---

[2] The term "useful life" was first inserted in the pertinent statutory provision in the Congressional enactment to the 1954 Code Section 167(b)(4). The accompanying House Report to the bill, H. Rep. No. 1337, 83d Cong., 2d Sess., p. 22 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4046-4047) stated:

> Depreciation allowances are the method by which the capital invested in an asset is recovered tax-free over the years it is used in a business. The annual deduction is computed by spreading the cost of the property over its estimated useful life.

> developments within the industry and the taxpayer's trade or business, (3) the climatic and other local conditions peculiar to the taxpayer's trade or business, and (4) the taxpayer's policy as to repairs, renewals, and replacements. Salvage value is not a factor for the purpose of determining useful life. If the taxpayer's experience is inadequate, the general experience in the industry may be used until such time as the taxpayer's own experience forms an adequate basis for making the determination. The estimated remaining useful life may be subject to modification by reason of conditions known to exist at the end of the taxable year and shall be redetermined when necessary regardless of the method of computing depreciation. However, estimated remaining useful life shall be redetermined only when the change in the useful life is significant and there is a clear and convincing basis for the redetermination. * * *

It is settled that "the primary purpose of depreciation accounting [is] to further the integrity of periodic income statements by making a meaningful allocation of the cost entailed in the use * * * of the asset to the periods to which it contributes." *Massey Motors* v. *United States, supra,* p. 104. In effect, the purpose of depreciation accounting is "to approximate and reflect the financial consequences of the subtle effects of time and use on the value of his capital assets." *Detroit Edison Co.* v. *Commissioner,* 319 U.S. 98, 101. See also *Virginian Hotel Co.* v. *Helvering,* 319 U.S. 523, 526, 528.

It is the responsibility of the taxpayer to establish

the reasonableness of the deductions for depreciation claimed. Treasury Regulations on Income Tax (1954 Code), Sec. 1.167(b)-0, Appendix, *infra*.

The parties stipulated (I-R. 13) and the District Court found (I-R. 26) that the facility in question had a physical life of at least 20 years.[3] It was the taxpayer's burden to show as a factual matter by a preponderance of the evidence that, on the basis of facts existing as of the end of 1960, it was reasonably certain the terminal would be used for less than 20 years, i.e., that the contract in question would not

---

[3] It was further stipulated and found (II-R. 100, I-R. 27) that the storage facility will have no commercial use upon termination of use by the United States Air Force.

be renewed over that period.[4] *Westinghouse Broadcasting Co.* v. *Commissioner,* 309 F. 2d 279 (C.A. 3d), certiorari denied, 372 U.S. 935; *Lassen Lumber & Box Co.* v. *Blair,* 27 F. 2d 17 (C.A. 9th); *Richmond Television Corp.* v. *United States,* 354 F. 2d 410 (C.A. 4th); *Gordon Lubricating Co.* v. *Commissioner,* decided May 18, 1965, 24 T.C.M. 697. Indefinite expectations *(Dunn* v. *Commissioner,* 42 T.C. 490; *Gordon Lubricating Co.* v. *Commissioner, supra)* or the taxpayer's unsupported opinion; *Bullock* v. *Commissioner,* 26 T.C. 276, 278-282, affirmed *per curiam,* 253 F. 2d 715 (C.A. 2d) is not enough to meet his

---

[4] The District Court, in rejecting taxpayer's claim to a right to use a five-year useful life, in part took into account facts existing at the time of trial (e.g., the then continuing operation of the facility and storage contract) which it referred to as "hindsight." Taxpayer here urges that the consideration of such circumstances was improper. For purposes of this appeal, the Government will not urge the propriety of the use of any evidence not known to, or reasonably knowable by, taxpayer as of the end of the year 1960—the tax year here in issue. Rather we will show that the taxpayer has failed to adduce any evidence capable of meeting its burden of showing that, as of the end of 1960, there was a reasonable certainty that the useful life of the storage facilities would end in less than the twenty years determined by the District Director and that, for this reason, the court below could not, in any event, properly have made any finding of useful life other than the one here under appeal.

burden. The facts presented by the taxpayer in attempted discharge of his burden must be such as to demonstrate grounds for a reasonable certainty that the useful life of the property would terminate at the time estimated by him and used in his depreciation schedule. E.g., *Lassen Lumber & Box Co.* v. *Blair, supra; Gordon Lubricating Co.* v. *Commissioner, supra.* Moreover, the issue before the trial court is not, as taxpayer seems to suggest (Br. 10-11), whether it was in fact subjectively persuaded (for whatever reasons) that five years was the period over which the facility should be depreciated but whether, on the facts presented to the trial court, one using the proper legal test governing depreciation deductions would reasonably have been justified in using that period. *Bullock* v. *Commissioner, supra; Lassen Lumber & Box Co.* v. *Blair, supra.* Compare *Richmond Television Corp.* v. *United States, supra.* The District Court rightly found (I-R. 27) "All the testimony and evidence indicated that the storage facility would be used for at least 20 years," and, we submit, fixing the focus on December, 1960 (Br. 21-38), it is clear that there is no basis in the record to support a reasonable certainty that a five-year period was the more likely useful life.

The primary and controlling evidence which established that, as of the time the contract was entered into, the probabilities involved here indicated a useful life for the taxpayer's facilities of 20 years, is

the contract itself and the conditions surrounding the award of the contract. First the contract clearly was awarded on a 20-year basis. It should be noted that the contract was awarded to the taxpayer on the basis of an over-all low 20-year bid, despite the fact that it was not low bidder for the initial five-year period (I-R. 27; II-R. 132-133, 135-136, 148-149, 151-152)[5] —a fact which, based on a necessary assumption of rational behavior by the Government representatives, clearly reflects their then belief that renewal was more likely than otherwise. Second, the District Court noted that the taxpayer itself was willing to take, had wanted and had gone after the contract on the basis of 20 years (I-R. 27, II-R. 67, 120, 123), knowing that it had lost a previous contract because, though the low bidder on the first five-year period, it had not been the 20-year low bidder (II-R. 63, 68, 120, 123). To achieve this end it even submitted a revised

---

[5]For example, see the schedule below comparing the taxpayer's bid for the first five-year period and that for the full 20-year period with those of two other bidders, Boyington and U.S. Service (for source of figures, see Taxpayer's Exhibit 13):

	Taxpayer	*Boyington*	*U.S. Service*
First five-year period	$3,584,500	$3,574,644.30	$3,349,986.60
Full 20-year period	$5,594,500	$6,790,644.30	$6,565,986.60

bid lower than its original bid. (I-R. 27.) Third, the options to renew were all on terms favorable to the Government. (II-R. 81-82.)[6] Nothing is shown to have happened between May of 1959 when the contract was awarded and the close of 1960 to alter the controlling effect of this evidence or to the taxpayer's contention that less than a 20-year use was indicated. *Westinghouse Broadcasting Co.* v. *Commissioner,* 309 F. 2d 279 (C.A. 3d), certiorari denied, 372 U.S. 935; *Richmond Television Corp.* v. *United States,* 354 F. 2d 410 (C.A. 4th).

---

[6]The contract was limited to an initial five-year lease period because Section 416 of the Act of August 3, 1956, P. L. 968, 70 Stat. 991 (now 10 U.S.C. 2388) enacted specifically to handle facilities such as the one in question imposed the following restriction (Br. 12):

> The Secretaries of the military departments are authorized to contract for the storage, handling, and distribution of liquid fuels for periods not exceeding five years, with option to renew for additional periods not exceeding five years, for a total not to exceed twenty years. This authority is limited to facilities which conform to the criteria prescribed by the Secretary of Defense for protection, including dispersal and also are included in a program approved by the Secretary of Defense for the protection of petroleum facilities. * * *

For further legislative history see taxpayer's brief, pp. 12-15.

On brief, taxpayer relies primarily upon two types of circumstances, allegedly existing and known in 1960, to support his contention that he has met his burden of showing a reasonable certainty that a five-year, rather than 20-year, useful life was proper. First, taxpayer cites (Br. 10-11) the fact that the binding contract was only for a five-year lease period and that there was no certainty (i.e., legal commitment) for renewal. But, as the Regulations (see Treasury Regulations on Income Tax, Secs. 1.167(a)-1(b) and 1.167(b)-0, Appendix, *infra*) clearly state, the estimate of useful life is not predicated upon, or limited to, legal or factual certainties but upon what, in the light of all the relevant facts, is the most likely period of use in taxpayer's business. See *Massey Motors, supra; United States* v. *Ludey,* 274 U.S. 295; *Lassen Lumber & Box Co.* v. *Blair, supra,* p. 19. Thus, as taxpayer itself recognizes (Br. 30), the question at bar is "whether it was more probable than not that the Government would renew its contract." The District Court held that the taxpayer having the burden of proof on the point, had failed to establish with the requisite certainty that it would not be renewed. The same comments apply to taxpayer's related references to (Br. 11) the bases upon which it had submitted its financial statements to its banker; to the period over which the bank had re-

quired repayment of the loan (Br. 11);[7] to the Government's right to terminate even before the end of the committed five-year period (Br. 16); and to the fact (Br. 16-17) that, as a prudent businessman, it had protected itself against nonrenewal by insisting upon reimbursement of its construction costs over the committed five-year period. None of these things control the useful life for depreciation purposes where the taxpayer fails to show that the probabilities were clearly for nonrenewal. Obviously, taxpayer and his bank would protect themselves against even a mere possibility of nonrenewal but such a prospect would not support use of a useful life limited to the first five-year lease period. See the relevant comments of this Court in *Lassen Lumber & Box Co.* v. *Blair, supra,* p. 19. Consequently, the fact that taxpayer did these things, whatever his motivation, is probative of nothing in so far as estimating useful life for tax depreciation purposes is concerned.

Second, taxpayer makes much (Br. 11) of certain rumors and conjectures which had come to his attention with respect to the phasing out of manned bombers. But, these were, as we will show, *infra,* nothing more than that. The record shows (II-R. 204

---

[7] In any event, by the impartial testimony of the bank's vice-president, these financing arrangements were standard procedure. (II-R. 229.)

et seq.), up through the taxable year here in issue, there had been no building of the Minutemen missiles by Boeing at the Grand Forks Air Force Base, nor evidence of discontinuance of the manned bombers. As taxpayer's president himself testified (II-R. 198), he had been told by the commander of the base, in 1960, that there was anticipated additional use by wing bombers. The true nature of the information available to the taxpayer respecting the anticipated influx of Minutemen missiles is seen in the following testimony of its president (II-R. 212-215):

A I think they will quit flying these manned bombers and they will cease to use our services very shortly, war or no war.

Q And can you tell me, what is the basis for this opinion?

A These planes are obsolete, they were designed nearly fifteen years ago, and it is not much of an airplane anymore.

Q Which airplane are you referring to?

A The B-52.

Q What makes an airplane obsolete?

A Oh, principally speed today.

Q Speed. How fast will the helicopter go?

A Oh, they are very slow.

Q Are they still used today?

A Oh, yes.

Q Are they obsolete?

A No, they even have one at Grand Forks for the purpose of supervising the missile site.

Q How about some of the prop planes, spotter planes, in Vietnam; are they obsolete?

A No, but if you were supplying fuel for them you could do it with a bucket.

Q That is not true with respect to the B-52, though, is it?

A Oh, no.

Q Did you know that the plans for the B-52 are that they are going to increase in the Grand Forks area? Did you know that?

A No, and our deliveries have started back down in the last couple of years.

Q Do you know what the projection is for the future?

A No.

Q You don't know. When you say that the B-52's have become obsolete, can you describe the research that you have gone into to determine this fact?

A I don't attempt to qualify myself as an expert on aerodynamics, but I, as a contractor to the Air Force, have occasion to get the opinions of the best people in the Air Force

I am able to, and they tell me the old girl has about had it.

Q What are the names of these people that you have mentioned?

A The names of these people? Well, a general named York, who—

Q What is his function?

A He is down in Texas at the present time. He was one of the Doolittle Raiders over Tokyo.

Q And what is his position with the Air Force?

A I think it is pretty much administrative.

Q What does he administer?

A I don't know at the present time?

Q He has nothing to do with the Fuel Supply Section of the Air Force, does he?

A No, I think he is in general administration.

Q Do you have any views of any people other than those in general administration?

A Yes, my conversations with pilots at local clubs and such.

Q So your information is based on conversations more of the bar room type?

A Well, in casual conversations with those people, yes.

Q I see. Are you also of the same opinion as Mr. Clack, that the B-70 will be a chemical fuel bomber?

THE COURT: You mean Mr. Davis?

MR. RAMSEY: As Mr. Davis, excuse me.

A The B-70 uses a highly sophisticated type of fuel, I understand, called JP-6, which I am not sure our facility is designed to store and handle. I think it has a vapor pressure.

Q Do you know what JP stands for?

A The same as JI-4, I presume, jet propulsion.

Q Not jet petroleum?

A Either jet propulsion or jet petroleum.

Q But you don't agree with Mr. Davis, that it is a chemical bomber?

A It is a highly sophisticated fuel that has additives that our present fuel does not have, and I am inclined to be of the opinion that with our present plants, without being able to handle high vapor pressures, probably would be unsatisfactory.

Q Did you know that they have started using JP-5 for the B-70 now?

A No, I don't know that, but the B-70 originally was not supposed to.

Q Have you made any research into the area

of whether or not your terminal facility could be adjusted for the use of any new fuels that might come along, if some did?

A Sure, you can redesign anything.

Q But have you made any research in an attempt to determine this?

A No. I do know they built two B-70's and they lost one of them.

Moreover, apart from the complete vagueness and conjectural nature of the taxpayer's basis for allegedly anticipating nonrenewal because of the use of missiles, it is of utmost importance to note that nowhere does taxpayer show basis for estimating (with reasonable certainty, or upon any other basis) over what period, assuming that there was reason to believe that the bombers would be phased out, the phasing out would take place or, therefore, as of what time it could anticipate that its facility would no longer be in profitable use. All military aircraft are in the process of obsolescing from the moment they are put into use and their successors are always on the drawing board. It is of no use then to show a basis for a reasonable belief that the B-52's in particular would, in reasonable anticipation, go into disuse at some unknown time in the future. It is the taxpayer's burden not only to show a basis for belief that phasing out would occur, or was occurring, but a basis for a reasonably certain belief that the phasing out would occur over some particular period

of time and that, as a result, taxpayer's facility would not be needed beyond a given point of time. Cf. *Lassen Lumber & Box Co.* v. *Blair, supra.* In this connection, it is necessary to take into account any continued period of use for existing B-52's, even after manufacture of new ones was discontinued for one reason or another. Further, the taxpayer must show not only that the facility would have no further use to the Government in connection with B-52's, but also that it was unlikely to have any continued usefulness in connection with fuel storage for other types of aircraft. None of these essential facts were developed by taxpayer at trial and he has, therefore, on this ground alone, clearly failed, as a matter of law, to carry his burden of proof. Hence, on this record, the District Court would have been clearly erroneous in finding anything other than that the 20-year useful life adopted by the Commissioner must stand. Cf. *Helvering* v. *Gowran,* 302 U.S. 238, 245-247, rehearing denied, 302 U.S. 781.

CONCLUSION

The judgment of the District Court should be affirmed. However, if this Court does not agree that, looking to the facts existing in 1960, the taxpayer has failed, as a matter of law, to adduce evidence sufficient to support a finding of a useful life of less than 20 years, then the case should be remanded for findings on the basis of the stated evidence.

Respectively submitted,

MITCHELL ROGOVIN,
Assistant Attorney General.
LEE A. JACKSON,
WILLIAM FRIEDLANDER,
JEANINE JACOBS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:
SMITHMOORE P. MYERS,
United States Attorney.
MAY, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: This -------- day of ----------------, 1968.

United States Attorney

APPENDIX

Internal Revenue Code of 1954:

SEC. 167. DEPRECIATION.

(a) *General Rule.*—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

(b) *Use of Certain Methods and Rates.*—For taxable years ending after December 31, 1953, the term "reasonable allowance" as used in subsection (a) shall include (but shall not be limited to) an allowance computed in accordance with regulations prescribed by the Secretary or his delegate, under any of the following methods:

(1) the straight line method,

(2) the declining balance method, using a rate not exceeding twice the rate which would have been used had the annual allowance been computed under the method described in paragraph (1),

(3) the sum of the years-digits method, and

(4) any other consistent method productive of an annual allowance which, when added to all allowances for the period commencing with the taxpayer's use of the property and in-

cluding the taxable year, does not, during the first two-thirds of the useful life of the property, exceed the total of such allowances which would have been used had such allowances been computed under the method described in paragraph (2).

Nothing in this subsection shall be construed to limit or reduce an allowance otherwise allowable under subsection (a).

(c) *Limitations on Use of Certain Methods and Rates.*—Paragraphs (2), (3), and (4) of subsection (b) shall apply only in the case of property (other than intangible property) described in subsection (a) with a useful life of 3 years or more—

(1) the construction, reconstruction, or erection of which is completed after December 31, 1953, and then only to that portion of the basis which is properly attributable to such construction, reconstruction, or erection after December 31, 1953, or

(2) acquired after December 31, 1953, if the original use of such property commences with the taxpayer and commences after such date.

*   *   *   *   *

(26 U.S.C. 1964 ed., Sec. 167.)

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.167(a)-1 *Depreciation in general.*

(a) *Reasonable allowance.* Section 167(a) pro-

vides that a reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business or of property held by the taxpayer for the production of income shall be allowed as a depreciation deduction. The allowance is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), so that the aggregate of the amounts set aside, plus the salvage value, will, at the end of the estimated useful life of the depreciable property, equal the cost or other basis of the property as provided in section 167(g) and §1.167(g)-1. An asset shall not be depreciated below a reasonable salvage value under any method of computing depreciation. However, see section 167(f) and §1.167(f)-1 for rules which permit a reduction in the amount of salvage value to be taken into account for certain personal property acquired after October 16, 1962. See also paragraph (c) of this section for definition of salvage. The allowance shall not reflect amounts representing a mere reduction in market value. See section 179 and §1.179-1 for a further description of the term "reasonable allowance."

(b) *Useful life.* For the purpose of section 167 the estimated useful life of an asset is not necessarily the useful life inherent in the asset but is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business or in the production of his income. This period shall be determined by reference to his experience with similar property taking into account present conditions and probable future developments. Some of the factors to be considered in determining this period are (1) wear and tear and decay or decline from

natural causes, (2) the normal progress of the art, economic changes, inventions, and current developments within the industry and the taxpayer's trade or business, (3) the climatic and other local conditions peculiar to the taxpayer's trade or business, and (4) the taxpayer's policy as to repairs, renewals, and replacements. Salvage value is not a factor for the purpose of determining useful life. If the taxpayer's experience is inadequate, the general experience in the industry may be used until such time as the taxpayer's own experience forms an adequate basis for making the determination. The estimated remaining useful life may be subject to modification by reason of conditions known to exist at the end of the taxable year and shall be redetermined when necessary regardless of the method of computing depreciation. However, estimated remaining useful life shall be redetermined only when the change in the useful life is significant and there is a clear and convincing basis for the redetermination. For rules covering agreements with respect to useful life, see section 167(d) and §1.167(d)-1.

*　　*　　*　　*　　*

(26 C.F.R., Sec. 1.167(a)-1.)

Sec. 1.167(b)-0 *Methods of computing depreciation.*

(a) *In general.* Any reasonable and consistently applied method of computing depreciation may be used or continued in use under section 167. Regardless of the method used in computing depreciation, deductions for depreciation shall not exceed such amounts as may be necessary to recover the unrecovered cost or other

basis less salvage during the remaining useful life of the property. The reasonableness of any claim for depreciation shall be determined upon the basis of conditions known to exist at the end of the period for which the return is made. It is the responsibility of the taxpayer to establish the reasonableness of the deduction for depreciation claimed. Generally, depreciation deductions so claimed will be changed only where there is a clear and convincing basis for a change.

(b) *Certain methods.* Methods previously found adequate to produce a reasonable allowance under the Internal Revenue Code of 1939 or prior revenue laws will, if used consistently by the taxpayer, continue to be acceptable under section 167(a). Examples of such methods which continue to be acceptable are the straight line method, the declining balance method with the rate limited to 150 percent of the applicable straight line rate, and under appropriate circumstances, the unit of production method. The methods described in section 167(b) and §§ 1.167(b)-1, 1.167(b)-2, 1.167(b)-3, and 1.167(b)-4 shall be deemed to produce a reasonable allowance for depreciation except as limited under section 167(c) and §1.167(c)-1. See also §1.167(e)-1 for rules relating to change in method of computing depreciation.

(c) *Application of methods.* In the case of item accounts, any method which results in a reasonable allowance for depreciation may be selected for each item of property, but such method must thereafter be applied consistently to that particular item. In the case of group, classified, or composite accounts, any method may be selected for each account. Such method

must be applied to that particular account consistently thereafter but need not necessarily be applied to acquisitions of similar property in the same or subsequent years, provided such acquisitions are set up in separate accounts. See, however, §1.167(e)-1 and section 446 and the regulations thereunder, for rules relating to changes in the method of computing depreciation, and §1.167(c)-1 for restriction on the use of certain methods. See also §1.167(a)-7 for definition of account.

(26 C.F.R., Sec. 1.167(b)-0.)

Sec. 1.167(b)-2 *Declining balance method.*

(a) *Application of method.* Under the declining balance method a uniform rate is applied each year to the unrecovered cost or other basis of the property. The unrecovered cost or other basis is the basis provided by section 167(g), adjusted for depreciation previously allowed or allowable, and for all other adjustments provided by section 1016 and other applicable provisions of law. The declining balance rate may be determined without resort to formula. Such rate determined under section 167(b)(2) shall not exceed twice the appropriate straight line rate computed without adjustment for salvage. While salvage is not taken into account in determining the annual allowances under this method, in no

event shall an asset (or an account) be depreciated below a reasonable salvage value. However, see section 167(f) and § 1.167(f)-1 for rules which permit a reduction in the amount of salvage value to be taken into account for certain personal property acquired after October 16, 1962. Also, see section 167(c) and § 1.167(c)-1 for restrictions on the use of the declining balance method.

*   *   *   *   *

(26 C.F.R., Sec. 1.167(b)-2.)

JUL 1968

IN THE

United States Court of Appeals

For the Ninth Circuit

WESTERN TERMINAL COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22387

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DICTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

REPLY BRIEF FOR THE TAXPAYER-APPELLANT

SCOTT B. LUKINS
FRANCIS J. BUTLER
BUTLER & LUKINS

725 Lincoln Bldg.,
Spokane, Washington 99201

TE 8-4474

Attorneys for Taxpayer-Appellant

FILED

C. W. HILL PRINTERS

JUL 1 1968

WM. B. LUCK, CLERK

IN THE

United States Court of Appeals

For the Ninth Circuit

WESTERN TERMINAL COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22387

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DICTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

REPLY BRIEF FOR THE TAXPAYER-APPELLANT

SCOTT B. LUKINS
FRANCIS J. BUTLER
BUTLER & LUKINS

725 Lincoln Bldg.,
Spokane, Washington 99201

TE 8-4474

Attorneys for Taxpayer-Appellant

TABLE OF CONTENTS

		Page
	CITATIONS	ii
A.	THE USE OF "HINDSIGHT EVIDENCE"	1
B.	THE "REASONABLE CERTAINTY" TEST	2
C.	TAXPAYER'S BURDEN OF PROOF	9
D.	CONCLUSION	12

CITATIONS

Cases — Page

Birmingham News Co. v. Patterson, 24 F.Supp 670 (D. C. Ala. 1964) aff'd 345 F.2d 531 .... 4, 8

Burnett v. Niagara Falls Brewing Co., 282 U.S. 648 (1931) 3, 5, 9

M. Pauline Casey v. Commissioner, 38 T.C. 357 (1962) 10, 12

Commonwealth Natural Gas Corporation v. United States —F.2d— (C.A. 4, 1968) 68-1 U.S.T.C. 9391 4

Gordon Lubrication Co. v. Commissioner, 24 T.C.M. 697 (1965) 5, 8

Indiana Broadcasting Corporation v. Commissioner 350 F.2d 380 (C.A. 7, 1965) cert. denied 382 U.S. 1027 4

Lassen Lumber and Box Co. v. Blair, 27 F.2d 17 (C.A. 9, 1928) 5, 7, 8, 9

Massey Motors, Inc. v. United States, 364 U.S. 92 (1960) 10

Moise v. Burnett, 51 F.2d 1017 (C.A. 9, 1931) 5, 9

Richmond Television Corp. v. United States, 354 F.2d 410 (C.A. 4, 1966) 4

John Paul Riddell, 12 T.C.M. 44 (1953) 12

Stateline and S. R. Co. v. Phillips, 98 F.2d 651 (C.A. 3, 1938) 8

United States v. Ludey, 274 U.S. 295 (1927) 4

E. A. Vaughey, 24 T.C.M. 1369 (1965) 10

Westinghouse Broadcasting Co. v. Commissioner, 309 F.2d 279 (C.A. 3, 1962) Cert denied 372 U.S. 935 4

CITATIONS (Continued)

Regulations Page

Treasury Regulation 1.167(a)-1(b) (26 C.F.R. Sec. 1.167) 5, 10

Treasury Regulation 1,167(a)-2 (26 C.F.R. Sec. 1.167) 4

Treasury Regulation 1.167(a)-3 (26 C.F.R. Sec. 1.167) 3

Miscellaneous

120 A.L.R. 446 at 448 5

120 A.L.R. 441 8

IN THE

United States Court of Appeals
For the Ninth Circuit

WESTERN TERMINAL COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22387

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DICTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

REPLY BRIEF FOR THE TAXPAYER-APPELLANT

This Brief is submitted by the Taxpayer-Appellant in reply to the portion of the Government's Brief which relates to the points argued in the Taxpayer's Brief and in answer to the additional points argued by the Government in its Brief.

A. THE USE OF "HINDSIGHT EVIDENCE".

In its Brief, the Government states that "for purposes of this appeal, the Government will not urge the propriety of the use of any evidence not known to, or reasonably knowable by, taxpayer as of the end of the year 1960—

the tax year here in issue." (Appellee's Brief, p. 15, fn. 4) The effect of this concession is to make inadmissible almost the entire testimony of Col. Morefield (II-R.230-242) since by his own admission he was not even associated with the Air Force Fuel Supply Center until August of 1964 (II-R.230). Moreover, none of the questions directed to him were based on facts known to, or reasonably knowable by, the taxpayer at the end of 1960. A similar disqualification applies in regard to much of the testimony of Francis J. DeFavio (II-R.124-175) since most of his testimony has to do with facts occurring after 1960 and consequently with opinions based on the use of hindsight evidence. As regards the testimony of these witnesses the only really significant fact established by them was that the Air Force had only a five year forward projection as to its fuel storage needs at any given facility (II-R.239).

The Taxpayer-Appellant contends that the admitted reliance of the lower Court on evidence which was not known to, or knowable by, the Taxpayer in 1960 constitutes reversable error and justifies the remand of this case to the lower Court.[1]

B. THE "REASONABLE CERTAINTY" TEST.

In its Brief (Brief for Appellee, p. 8, 14, 15) the Gov-

---

[1] The attention of the Court should be directed to the second to the last paragraph and the next to the last paragraph of the Government's Statement appearing on page 5 of its Brief, and the first full paragraph of the Government's Statement appearing on page 7 of its Brief. All three of these paragraphs require the use of hindsight evidence and should therefore be deleted from the Statement of Fact.

ernment states that the Taxpayer had the burden of proving by a preponderance of the evidence that it was "reasonably certain" that its fuel storage facility would be used by the Government for a period of 20 years. This statement is to be contrasted with the contention of the Taxpayer that it was only required to support its 1960 estimate of the useful life of its fuel storage facility by a preponderance of the evidence (Brief for Appellant, p. 37).

As regards these divergent views, the United States Supreme Court, some 37 years ago, held that a taxpayer need prove the reasonableness of its claim for obsolescence (or depreciation) by "such weight of evidence as would support a verdict for a Plaintiff in an ordinary action for money" *Burnett v. Niagara Falls Brewing Co.* 282 U.S. 648 (1931). In so holding, the Supreme Court stated

> "It would be unreasonable and violate that canon of construction to put upon a taxpayer the burden of proving to a reasonable certainty the existence and amount of obsolescence."
>
> *Burnett v. Niagara Falls Brewing Co.,* supra at 650.

And still later the Supreme Court stated

> "Neither the cost of obsolescence *nor of accruing exhaustion, wear and tear* that is properly chargeable in any period of time can be measured accurately. A *reasonable approximation* of the amount that fairly may be included in the accounts of any year is all that is required." [emphasis added] *Burnett v. Niagara Falls Brewing Co.,* supra at 650.

The above quoted reference to a "reasonable approxima-

tion" as a test for obsolescence is similar to the earlier statement of the Supreme Court in *United States v. Ludey,* 274 U.S. 295 (1927) that a depreciation allowance must be made, even though the computation was based on a "rough estimate".

Furthermore, as regard the issue of the degree of proof required of a taxpayer, while it is true that the Commissioner's Regulations state that as to *intangible assets* depreciation is to be allowed only in those cases where the length of use can be estimated with "reasonable accuracy". Treas. Reg. 1.167(a)-3 (26 C.F.R. Sec. 1.167), and that several courts have held that radio and television broadcasting rights and licenses constitute non-depreciable assets by reason of the inability of the owners thereof to establish a definite useful life for such assets. *Westinghouse Broadcasting Co. v. Commissioner,* 309 F.2d 279 (C.A. 3, 1962) cert. denied 372 U.S. 935; *Indiana Broadcasting Corporation v. Commissioner,* 350 F.2d 380 (C.A. 7, 1965) cert. denied 382 U.S. 1027; *Richmond Television Corp. v. United States,* 345 F.2d 410 (C.A. 4, 1966); but cf. *Commonwealth Natural Gas Corporation v. United States* ——F.2d—— (C.A. 4, 1968) 68-1 U.S.T.C. 9391; *Northern Natural Gas Company, v. O'Malley,* 277 F.2d 128 (C.A. 8, 1960) and *Birmingham News Co. v. Patterson,* 24 F.Supp. 670 (D.C. Ala. 1964) aff'd. 345 F.2d 531, it should be noted that the immediately preceding regulation, which relates to *tangible property,* contains nothing to indicate that a smiliar degree of proof is required as to this type of property. Treas. Reg.

1.167 (a)-2 (26 C.F.R. 1.167). Rather, the more general regulation entitled "useful life" indicates that for purposes of estimating the useful life of any given depreciable asset a taxpayer should consider "his experience with similar property taking into account present conditions and probable future developments". Treas. Reg. 1.167 (a)-1(b) (26 C.F.R. 1.167). This is exactly what was done by the Taxpayer in the instant case as is evidenced by the testimony of its two principal officers. (II-R.39-123, 177-216); see also the comment of the lower Court. (II-R. 246-248).

Refining the legal issues even more closely, the Government's reliance upon the "reasonable certainty" test appears to be taken from the language of an opinion of the Court of Appeals for the Ninth Circuit rendered some 40 years ago, see, *Lassen Lumber and Box Co. v. Blair,* 27 F.2d 17 (C.A. 9, 1928), and repeated more recently by the United States Tax Court in one of its memorandum opinions, see, *Gordon Lubricating Co. v. Commissioner,* 24 T.C.M. 697 (1965). Taxpayer's argument, on the other hand, is based upon the forthright rejection of the "reasonable certainty" test in *Burnett v. Niagara Falls Brewing Co.,* supra., and by the apparent acquiescence in the result of that case by the Court of Appeals for the Ninth Circuit in *Moise v. Burnett,* 52 F.2d 1071 (C.A. 9, 1931); See 120 A.L.R. 446 at 448.

In *Lassen Lumber and Box Co,* supra, the taxpayer had been engaged in the logging and lumber business in California and in connection therewith had acquired a timber

contract from the United States Government allowing it to log some 26,000 acres of an adjacent forest over a period of eleven years. It proceeded to construct a sawmill near the forest, using in the main second hand equipment. In preparing its income tax return, the taxpayer based its estimate of the useful life of its mill assets on the 11 year period of its contract. The Commissioner, on the other hand, determined that the taxpayer's sawmill and logging equipment should be depreciated over the period of their longer physical useful life.

Upon the evidence adduced at the trial, the Board of Tax Appeals found that the physical useful life of portions of the taxpayer's plant was 10 years or less, on other portions 15 years and on the remainder 20 years. The Board also found that the stumpage on the 26,000 acres exceeded the amount estimated and that because of this fact the taxpayer could have confidently expected an extension, if desired, of the 11 year contract. In actual fact, the contract was extended for a period of 8½ years or for a total of 19½ years in all. In addition, the Board found that there was a considerable supply of privately owned logs and timber which was available to the taxpayer, and that the taxpayer had, in the year just prior to the hearing, actually purchased substantial quantities of such timber. Also, additional government timber was available within a reasonable distance of taxpayer's sawmill.

Based on this evidence the Board of Tax Appeals upheld the Commissioner's determination as to the useful life of the taxpayer's depreciable assets. The Court of Ap-

peals affirmed, holding that the conclusion of the Board was not without reasonable basis. In so doing, it determined that the burden of proof was on the taxpayer to establish with a reasonable degree of certainty that its plant would be useless at the end of the original contract period. In this regard, the Court's opinion states as follows:

> "We do not think it was error for the Board to hold that before the loss could be so spread, it must appear to a practical certainty that the plant would be useless at the end of the period. . . . While upon the assumption that the loss will, in fact, be incurred, it is but fair to spread it ratively over the entire period. It is also only fair to require that it be shown by a preponderance of proof that its occurrence in the future is reasonably or practically certain to take place. A possibility or mere probability is not enough. It is not a case where we may apply the law of averages, based upon wide experience under similar conditions. Upon the facts of a special case we are asked to forecast a future for 10 years and this we ought not to do, where it is possible at a later date to correct a mistake and avoid substantial injustice therefrom by appropriate adjustments, unless the happening of the contingency is reasonably certain to occur. . . ." *Lassen Lumber and Box Co. v. Blair,* supra, 19-20.

The Taxpayer in the instant case in no way disagrees with the decision of the Court of Appeals in the *Lassen Lumber and Box Co.* case. Certainly there was ample evidence in the record to overcome the taxpayer's contention in that case that its sawmill and logging equipment would lack an economic use at the end of the 11 year contract period and that, consequently, the useful life of its depreciable assets should have been determined upon the

basis of economic rather than physical factors. As mentioned above, the Board of Tax Appeals had found that the taxpayer could have confidently expected an extension of the length of its contract, if needed, and even if such extension had not been granted there was a considerable supply of privately owned timber and additional government owned timber which would have been available to it within a reasonable distance of its plant. In short, there was a secondary use for the taxpayer's sawmill following the completion of its initial 11 year contract. Similarly, in *Gordon Lubricating Co.,* supra, there was considerable evidence to support the Government's contention that a commercial or secondary use existed for the taxpayer's deep water terminal facility following the term of its then existing contract. Consequently, even if such contract were not renewed the taxpayer would still have had a continuing use for its property.

The factual situation in the instant case is quite different. Not only was the Court below called upon to render its decision before it could determine whether or not the Air Force would exercise one or more of its two remaining five years renewal options, compare *Lassen Lumber and Box Co. supra* with *Birmingham News Co. v. Patterson, supra,* but more importantly the parties stipulated that the Taxpayer's fuel storage facility would have no commercial use upon termination of use by the Government (I-R.27) (11-R. 100). Consequently, it is not possible to excuse as harmless error, as was done in *Stateline and S. R. Co. v. Phillips,* 98 F.2d 651 (C.A. 3, 1938); 120 A.L.R. 441, the

use by the lower Court of a burden of proof test based upon reasonable certainty rather than a mere preponderance of the evidence.

One final point requires mention. The opinion of the Court of Appeals in *Lassen Lumber and Box Co. v. Blair, supra,* was rendered in 1928. This was some three years prior to the publication of the opinion of the United States Supreme Court in *Burnett v. Niagara Falls Brewing Co.,* supra. This time difference has led at least one periodical to conclude that the "reasonable certainty" test mentioned in the *Lassen Lumber and Box Co.* case had been rejected in favor of the more common "mere preponderance of the evidence" test. See 120 A.L.R. 446 at 448. In fact, as implied earlier, the Court of Appeals for the Ninth Circuit, without mentioning its earlier decision in *Lassen Lumber and Box Co.* supra, has held that a taxpayer is not required to prove obsolescence "to a mathematical certainty." *Moise v. Burnett, supra.* In so doing, it cited the *Niagara Falls Brewing Co.* case with approval.

C. TAXPAYER'S BURDEN OF PROOF.

Taxpayer-Appellant is frank to concede that the Commissioner's determination of the useful life of its fuel storage facility is presumptively correct, and that the burden rests with it to prove that the Commissioner's determination of useful life is erroneous. Likewise, both the Government and the Taxpayer now agree that such proof must consist of facts known, or reasonable knowable, by the taxpayer at the end of the year for which the depreciation deduction was taken.

The Supreme Court has stated that the useful life of an asset is "the number of years the asset is expected to function profitably in use" *Massey Motors, Inc. v. United States,* 364 U.S. 92 (1960). This test logically assumes that when an asset can no longer be profitably used by its owner it will be disposed of. Thus, while the physical life of an asset is one of the factors which will be considered in determining its economic life, this factor cannot be used as the sole criterion in determining useful life for depreciation purposes where it is shown that the asset will have a shorter economic life than physical life. *M. Pauline Casey v. Commissioner,* 38 T.C. 357, at 381 (1962). See also *E. A. Vaughey,* 24 T.C.M. 1369, (1965).

The basis and justification for taxpayer's original estimate of useful life, and the basis and justification for the testimony and other evidence presented to the lower Court in this case was that the experience of its officers with similar fuel storage facilities was the best and most reliable evidence of useful life that was available to it. Certainly, as to this point the Commissioner's own regulations would so indicate. Treas. Reg. 1.167(a)-1(b) (26 C.F.R. 1.167)

The Government's theory of the case is different. Its position is that Taxpayer's fuel storage facility was tied so closely to the Grand Forks Air Force Base that what was needed was expert testimony concerning the probable useful life of the base itself. (II-R.26-27, 90-93). While Taxpayer's principal witness was familiar with the Grand Forks Air Force Base and the activities being conducted there, he did not attempt to qualify as an expert capable

of evaluating exactly how long that base would remain in use. (II-R.92). He did seek to explain, however, just why it was that he and Mr. Clack had utilized a five-year estimate of useful life for taxpayer's fuel storage facility and why such estimate was a reasonable one. For example, Mr. Davis was quick to point out that under normal circumstances Taxpayer's fuel storage facility would have had very little value as a commercial fuel storage facility after the initial five year contract period since it seemed probable that the Grand Forks Air Force Base would require either less fuel or an entirely different type of fuel for its activities following the completion of such term. As to the latter assumption, there was the expectation that the B-52 bomber would be replaced by the so-called B-70 "Chemical fuel bomber" (II-R.102-103), and as to the former assumption there was the realization that the Great Lakes Pipeline Company, sitting as it was only one mile away from Taxpayer's facility in a market area that was experiencing decreasing commercial usage, could easily and more competitively service the Base. (II-R, 93, 112) Finally, as explained by Mr. Clack, there was the generally prevalent feeling that the inter-continental missle system then being planned for installation near Grand Forks, North Dakota, would hasten the phasing out process inherent in the B-52 bomber (II-R.200-206). These factors, together with the experience gained by taxpayer's officers in dealing with the Government in regard to similar contracts, and the very language of Negotiated Contract ASP-17894, quite understandably resulted in the Taxpayer es-

timating the useful life of its fuel storage facility at five years.

The Tax Court of the United States has correctly stated that

> "Inasmuch as the determination of useful life is a question of fact taking into consideration many factors, we must necessarily rely, in addition to any other relevant evidence, upon the estimates testified to by those who are personally familiar with the assets and are qualified to give an expert opinion as to their approximate useful life" *M. Pauline Casey, supra,* at 381.

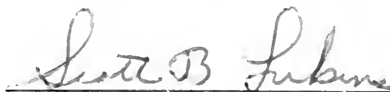
The testimony of Taxpayer's officers and the other evidence adduced at the trial of the instant case meets the abovementioned standard and such evidence, in the absence of contraverting evidence from the Government's own witnesses, was more than sufficient to carry the Taxpayer's burden of proof. See *John Paul Riddell,* 12 T.C.M. 44 (1953).

D. CONCLUSION.

The issue before the Court was one of whether or not the Taxpayer, at the end of 1960, could reasonably have expected the Government to exercise its option to renew its fuel storage contract for one or more of its three remaining five year renewal periods, and, if so, for what length of time. It is submitted that in this age of political turmoil and of constantly changing methods of military preparedness, the Taxpayer acted both reasonably and prudently in estimating the life of its Grand Forks Fuel Storage facility

at five years. Certainly the history of other such facilities as well as the history of the B-52 bomber and the Government's missle programs indicate how tenuous any other estimate would have been. The District Court erred in failing to find that the Taxpayer's estimate of useful life was reasonable and its decision should therefore be reversed and the case remanded for entry of judgment in favor of the Taxpayer-Appellant. In the alternative, the decision of the District Court should be reversed and the case remanded for new findings of fact based upon the evidence known to or knowable by, the Taxpayer as at the end of 1960.

Respectfully submitted,



Scott B. Lukins

Francis J. Butler

BUTLER & LUKINS
725 Lincoln Bldg.,
Spokane, Washington 99201

Attorneys for Appellant

CERTIFICATE

I certify that in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing Brief is in full compliance with those rules.

DATED this 26th day of June, 1968.

Scott B. Lukins

Scott B. Lukins